(28,443)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 488.

JAMES A. BAKER, RECEIVER OF THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

KARL L. DRUESEDOW, TAX COLLECTOR OF HARRIS COUNTY, TEXAS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

INDEX.

	Original.	Print.
Record from the district court of Harris County	1	1
Caption	1	1
Plaintiffs' first amended original petition	2	1
Defendants' plea in abatement and original answer	26	23
Plaintiffs' first supplemental petition	65	50
Defendants' supplemental plea in bar and supplemental answer	69	53
Defendants' second supplemental petition in reply to defendants' supplemental plea in bar, etc	74	57
Defendant Druesedow's plea in reconvention and cross-action	75	58
Answer of plaintiffs to defendant Druesedow's cross-action and plea in reconvention	76	59

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	Original.	Print.
Judgment	76	59
Conclusions of law and fact of the court	80	62
Motion by plaintiffs that the court find certain conclusions of fact	84	65
Motion by plaintiffs that the court find certain conclusions of law	95	73
Order of the court allowing plaintiffs to file an amended motion for new trial	100	77
Amended motion for new trial	101	78
Order overruling motion for new trial	126	97
Order extending time	127	98
Order extending time	127	99
Plaintiffs' bill of exceptions No. A	129	100
No. B	130	101
No. C	131	102
No. D	132	103
No. E	134	104
No. F	136	106
No. 3	138	107
Appeal bond	139	109
Clerk's cost bill	141	111
Clerk's certificate	142	112
Formulas of the State tax board used in case of I. & G. N. Ry.	143	113
Formulas used by the State tax board, other Texas railroads, as follows:		
Abilene & Southern Ry. Co	145	115
Texas & New Orleans R. R. Co	145	115
Angelina & Neches River Ry. Co	145	115
Artesian Belt Railroad	146	116
The Asherton & Gulf Ry. Co	146	116
Bartlett & Western Ry. Co	147	117
Beaumont, Sour Lake & Western Ry. Co	147	117
Brownwood North & South Ry. Co	148	118
Cairo Northern Ry. Co	148	118
Chicago, Rock Island & Gulf Ry. Co	149	119
Crosbyton Southplains Ry. Co	149	119
Denison & Pacific Suburban Ry. Co	150	120
Eastern Tex. Ry. Co	150	120
El Paso & Northeastern R. R. Co	151	121
El Paso & Southern Ry. Co	151	121
El Paso & Southern R. R. Co	152	122
Ft. Worth & Denver City Ry. Co	152	122
Ft. Worth & Rio Grande Ry. Co	153	123
Galveston, Harrisburg & San Antonio Ry. Co	153	123
Galveston, Houston & Henderson R. R. Co	154	124
Groveton, Lufkin & Northern Ry. Co	154	124
Quanah, Acme & Pacific Ry. Co	155	125
Gulf, Colorado & Santa Fe Ry. Co	155	125
Gulf, Texas & Western Ry. Co	156	126

	Original.	Print.
Houston & Brazos Valley Ry. Co.	156	126
Houston, East & West Tex. Ry. Co.	157	127
Houston & Texas Central R. R. Co.	157	128
Jefferson & Northwestern Ry. Co.	158	128
Kansas City, Mexico & Orient Ry. Co.	158	129
International & Great Northern Ry. Co.	159	129
Marshall & East Tex. Ry. Co.	159	130
Missouri, Kansas & Tex. Ry. Co. of Texas	160	130
Missouri, Oklahoma & Gulf Ry. Co. of Texas	160	131
Moscow, Camden & San Augustine Ry. Co.	161	131
Nacogdoches & Southeastern R. R. Co.	161	132
Orange & Northwestern R. R. Co.	162	132
Panhandle & Santa Fe Ry. Co.	162	133
Paris & Great Northern Ry. Co.	163	133
Paris & Mt. Pleasant R. R. Co.	163	134
Pecos Northern Ry. Co.	164	134
Pecos River R. R. Co.	164	135
Pecos Valley Southern Ry. Co.	165	135
Rio Grande & Eagle Pass Ry. Co.	165	136
Rio Grande, El Paso & Santa Fe Ry. Co.	166	136
Rio Grande Ry. Co.	166	136
Roscoe, Snyder & Pacific Ry. Co.	167	137
St. Louis, Brownsville & Mexico Ry. Co.	167	137
St. Louis, San Francisco & Texas Ry. Co.	168	138
St. Louis Southwestern Ry. Co. of Tex.	168	138
San Antonio & Aransas Pass Ry. Co.	169	139
San Antonio, Uvalde & Gulf R. R. Co.	169	140
San Benito & Rio Grande Valley Co.	170	140
Shreveport, Houston & Gulf R. R. Co.	170	141
Southern Ry. Co.	171	141
Stephenville North & South Tex. Ry. Co.	171	142
Sugar Land Ry. Co.	172	142
Texarkana & Ft. Smith Ry. Co.	172	143
Texas, Arkansas & Louisiana Ry. Co.	173	143
Tex. Mexican Ry. Co.	173	144
Texas Midland R. R. Co.	174	144
Tex. & Pac. Ry. Co.	174	145
Tex. Short Line Ry. Co.	175	145
Tex. Southeastern Ry. Co.	175	146
Timpson & Henderson Ry. Co.	176	146
Trinity & Brazos Valley Ry. Co.	176	147
Trinity Valley & Northern Ry. Co.	177	147
Trinity Valley Southern R. R. Co.	177	148
Weatherford, Mineral Wells & Northwestern Ry. Co.	178	148
Wichita Valley Ry. Co. and leased lines	178	149
Proceedings before the State tax board in Austin, at the public hearing held, and evidence submitted at that hearing by the plaintiffs	179	149
Decree of the U. S. district court, No. 49, equity, appointing receivers of I. & G. N. Ry.	217	174

	Original.	Print.
Decree of foreclosure I. & G. N. Ry., May 17, 1915	217	174
Tables of exhibits made before the State tax board	218	174
Testimony of W. J. Werner, auditor of plaintiffs	219	175
Report to the State tax board by auditor for the receivers covering the calendar year 1914, made in 1915	224	178
Statement and explanation of I. & G. N. Ry. and receivers' floating debt, June 30, 1915	235	192
Testimony of W. L. Maury	236	193
Table showing net income of railway properties available for interest, dividends, additions, and betterments, and net per cent thereof to R. R. Commission valuation, 1901 to 1914	237	194
Testimony of W. J. Werner [illegible] recalled by plaintiffs	239	195
Capital debt of properties, 1911-1914	240	195
Stocks and bonds outstanding, June 30, 1889-1914	242	196
Total stocks and bonds per mile road and per cent of net income thereto, 1890-1914	244	197
Table operating revenues, 25 fiscal years, 1890-1914	246	198
Table operating expenses, 25 years, 1890-1914	248	199
The I. & G. N. dollar and graphic representation of description of gross income	250	200
Table of taxes and operating charges, 25 fiscal years, 1890-1914	252	201
Table of taxes 1900-1909-191[illegible] appropriation per mile	254	202
Table of payments for loss [illegible] damages and personal injuries, 1890-1914	256	203
Testimony of T. C. Dunn	258	204
Testimony of W. D. Sherwood	262	206
Continuation of cross-examination of W. J. Werner by defendants	266	209
Table introduced by defendants in connection with cross-examination of Mr. Werner of the total cost of properties and per cent of income	267	210
Trust agreement introduced by defendants in connection with cross-examinaton of W. J. Werner, executed between the I. & G. N. Ry. and the Central Trust Co. of N. Y. in 1911	269	211
Table introduced by defendants in connection with testimony of Werner showing book value of rolling stock, as of January 31, 1916	272	213
Table introduced by defendants in connection with cross-examination of Werner of charges to additions and betterments, July 1, 1914, to January 31, 1916	274	215
Table in correction of previous table introduced above, showing net income available for interest, dividends, additions, and betterments and per cent to Railroad Commission valuation, 1901-1914	275	216
Testimony of H. Booth	277	217
Thornwell Fay	289	225
W. L. Holder	300	232

	Original.	Print.
Statement of amount of taxes paid by railroad properties, 1900-1914	300	232
Documents showing legal history of I. & G. N. Ry. properties	303	235
Agreement that plaintiff had paid all taxes on tangibles assessed in Harris County	306	236
Testimony of J. H. Wolf	306	237
Testimony of J. R. Peden	307	238
Map of Harris County, Exhibit 1	308	238
Testimony of J. M. Heiser	308	238
Testimony of Cabeen Blake	318	244
Continuation of testimony of J. M. Heiser	325	249
Assessment of First National Bank and its taxes	334	254
Assessment of Lumbermans National Bank and its taxes	335	255
Assessment of National Bank of Commerce	335	255
Assessment of the South Tex. Commercial National Bank.	335	255
Assessment of Union National Bank	336	256
Assessment of the Guaranty State Bank	336	256
Assessment of trust companies	336	256
Sherwood & King's Bank stock quotations	337	256
Testimony of H. G. Lidstone	351	265
Testimony of T. B. Eastburn	359	270
Agreement that allegations in the petition were correct of amount apportioned to Harris County of intangible valuation and that the amount of taxes claimed thereon as set out in plaintiffs' petition was correct, and that mileage of railway as alleged in plaintiffs' petition and in Harris County was correct	371	276
Testimony of J. M. Heiser (when recalled)	372	278
Testimony of H. G. Lidstone (recalled)	374	280
Rendition for taxes of plaintiffs in Harris County for 1915	377	281
Comparative general balance sheet to the Railroad Commission of I. & G. N. Ry. for fiscal year ending June 30, 1914	378	282
Communication from T. J. Freeman, receiver and general manager I. & G. N. Ry., of May 5, 1911, addressed to Railroad Commission	383	283
Sections 22, 24, of pleadings of plaintiffs in U. S. court	387	285
Petition of receivers of I. & G. N. Ry. in pending receivership	387	286
Exhibit "A" of report of receivers to the State tax board, 1916, covering statistics for 1915	389	289
Income account in the last-mentioned report	390	290
Report of I. & G. N. Ry. with respect to rolling stock to the State tax board contained in report filed March 14, 1913	391	291
Excerpts from brief filed with the attorney general in 1913	392	294
Statement of intangible values as found by the State tax board of the Texas railroads, 1914 and 1915	408	305

	Original.	Print.
Testimony of W. H. Ward	409	306
J. W. Campbell	422	315
H. G. Lidstone (recalled by the defendants)	425	317
Physical and intangible valuations of I. & G. N. properties made by the State tax board, years 1906 to 1915, inclusive	427	318
Table showing total values as found by the State tax board of all Texas railroads, years 1914 to 1915	427	319
Table of mileage of Texas railroads made by Railroad Commission	429	321
Testimony of W. L. Holder (recalled by the defendants)	431	324
Exhibit 18—Map	434	326
20—Map	435	327
21—Map	435	327
23—Map	436	327
Petition of receivers (plaintiffs here) to U. S. court for permission to purchase rolling stock	437	328
Petition of receivers (plaintiffs here) to U. S. court for permission to pay for rolling stock purchased in previous receivership	437	328
Testimony of A. B. Kelly	438	329
Exhibit 16—Map	438	329
19—Map	440	330
18—Map	441	331
17—Map	441	331
20—Map	443	332
21—Map	443	332
23—Map	444	333
21—Map	444	333
Exhibits 2 to 23, inclusive, introduced	445	333
Testimony of A. E. Ammerman	445	334
Assessment of I. & G. N. Ry. for 1912, Harris County, introduced by plaintiffs in connection with witness's testimony	457	341
Statement from report of I. & G. N. Ry. to the Railroad Commission of Texas for the year ending June 30, 1914, list of stockholders	458	342
Statement of equipment trust obligation from last report	459	342
Funded debt statement	460	342
Instructions for answering questions contained in last-mentioned report and statement of rents receivable, etc.	462	343
Proceedings in U. S. court in case of Baker and Lyon, Receivers, *et al. vs.* Bagby *et al.*	464	345
Bill of complaint filed by plaintiffs herein in U. S. court	464	345
Order of U. S. judge permitting filing of bill	465	345
Restraining order	466	346
Motion to dismiss bill	466	346
Answer	467	347
Supplemental bill	477	354

	Original.	Print.
Supplemental bill and answer to defendants' answer	477	355
Proceedings	479	356
Order of the U. S. court	479	356
Order of U. S. court on November 5, 1915, dismissing the case	480	357
Testimony of A. P. Bagby	480	357
W. H. Ward (recalled)	504	374
H. G. Lidstone (recalled)	506	375
R. D. Parker	506	375
Thompson's report on Magnolia Park valuation	508	376
Commission valuation of properties in Harris County	510	378
Maps "Exhibits 2 to 15, inclusive," herewith	514	381
Railroad Commission statement of valuations of I. & G. N. properties in Harris County, introduced in connection with the cross-examination of Mr. Parker, and Mr. Parker's reproduction estimate cost thereof, in considering increase in value of real estate	515	381
Testimony of Arthur Lefevre	516	383
W. J. Werner, auditor of plaintiffs (recalled)	530	393
Sam H. Dixon	533	394
Admission that the orders of the U. S. court copied in supplemental petition of plaintiffs herein is correct, and that copies of the orders of the U. S. judge were correct, being above stated in evidence	539	398
Statement of total obligations of receivers and railway, existing December 31, 1914, eliminating stock	539	398
Proceedings in court of civil appeals	542	400
Opinion	542	400
Judgment	564	416
Motion for rehearing	565	417
Opinion on motion for rehearing	630	462
Order overruling motion for rehearing	634	465
Petition for writ of error	635	46[illegible]
Answer to petition for writ of error	712	519
Order granting writ of error	741	538
Bond for writ of error	741	538
Order of reference to Commission of appeals	744	541
Opinion, Spencer, J	744	541
Judgment	755	548
Motion for rehearing	756	549
Order overruling motion for rehearing	790	575
Petition for writ of error and allowance thereof	790	575
Bond for writ of error	808	590
Writ of error	812	592
Citation in error with acceptance of service	815	594
Assignment of errors	817	595
Prayer for reversal	832	607
Praecipe for record	833	608
Certificate of clerk	836	610

1 *Caption.*

THE STATE OF TEXAS,
County of Harris:

At a Term of the District Court begun and holden at Houston, Texas, within and for the County of Harris before the Honorable J. D. Harvey, Judge of the 80th Judicial District in and for said County, beginning on the 6th day of March, A. D. 1916, and ending on the 1st day of April, A. D. 1916, the following cause came on for trial, to-wit:

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of I. & G. N. Railway Co.,

vs.

KARL L. DRUESEDOW, Tax Collector, Harris County, Texas, et al.

2 *Plaintiffs' 1st Amended Original Petn.*

Filed Mar. 6th, 1916.

In the District Court of Harris County, Texas.

JAMES A. BAKER and CECIL A. LYONS, Receivers of the International & Great Northern Railway Company, and the International & Great Northern Railway Company, Plaintiffs,

vs.

KARL L. DRUESEDOW, Collector, and W. H. WARD, County Judge, and W. H. Lloyd and J. A. Smith and W. H. Kiser and D. Barker, County Commissioners of Harris County, Texas, Defendants.

To the Honorable the Judge of said Court:

Now come Jas. A. Baker and Cecil A. Lyon, Receivers of the International & Great Northern Railway Company, and the International & Great Northern Railway Company, plaintiffs, and complain of Karl L. Druesedow, Collector of Taxes, for Harris county, Texas, and of W. H. Ward, County Judge thereof, and W. H. Lloyd and J. A. Smith and W. H. Kiser and D. Barker County Commissioners thereof, and with the County Judge constituting its Commissioners' Court and Board of Equalization, defendants and represent:

I.

The International & Great Northern Railway Company (hereinafter designated the I. & G. N. Ry.) is a corporation, incorporated

under the laws of Texas, domiciled at Houston, in Harris county, Texas, by its charter dated August, 1911.

Jas. A. Baker and Cecil A. Lyon were appointed Receivers of the I. & G. N. Ry., on the bill of the Central Trust Company of New York, filed in the District Court of the United States for the Southern District of Texas, the appointment being made August 10th, 1914. They promptly qualified and entered upon their duties. In the order appointing them it was stated that they were "authorized and empowered to institute and prosecute, within the State of Texas, or elsewhere, and in their names as Receivers, or in
3 the name of the International & Great Northern Railway Company as they may be advised by counsel, all such suits as may be necessary in their judgment for the proper protection" of the properties committed to their charge, which were all of the properties of the railway company; and, further, to defend, compromise or settle all suits against them, and to appear in and conduct the prosecution of defense, of, or compromise or settle any pending actions, or any actions which might be brought in any court to which the railway company is or might be a party, and which, in the judgment of the Receivers, affect the property. They have been advised by counsel to bring this suit.

Jas. A. Baker is a resident citizen of Harris county, Texas, and Cecil A. Lyon is a resident citizen of Grayson county, Texas.

The above mentioned Collector of Taxes and County Judge and County Commissioners, defendants herein, are resident citizens of this county.

II.

(1) The State Intangible Tax Board of Texas was composed, in 1915, of A. P. Bagby, Jr., Tax Commissioner of the State of Texas, H. B. Terrell, Comptroller of the State of Texas and John G. McKay, Secretary of State of the State of Texas.

(2) The I. & G. N. Ry. Company owns about 1,107 miles of main track railroad, all in this State, and extending into this county. In connection with the tracks, all in active operation, the railway owns stations, yards, grounds, equipment and all, or some of all, of the property usually owned by a railroad for the purpose of performing the duties of a public carrier, which it is, and has a portion thereof in this county.

(3) This suit is brought for the purpose of preventing the accrual and collection of illegal taxes and the enforcement of liens to secure the same, and to prevent the clouding of the titles of properties of the railway; and for the protection of the rights of all persons involved and the numerous creditors of the railway,
4 of whom there are a great number.

(4) By Chapter 4, Article 126, of the Revised Statutes of 1911, a method is provided for the ascertainment of the existence of and the valuation of intangible properties of railroads, and a State Tax Board is constituted, which was composed in the year 1915 of the

above mentioned Bagby, Terrell and McKay. The board is directed to apportion, among the different counties penetrated by any railway, on a mileage basis, the intangible values which they may find such railway does own.

Chapter 4, Title 126 of the Revised Statutes of Texas is unconstitutional and void and in conflict with the constitution of the United States and of the State of Texas, because:

(*a*) It lodges in this board the power to make assessments in conflict with sections 8, 11 and 14, Article VIII of the Constitution of the State of Texas, and with the other provisions of that constitution, in providing a method of assessment not local in its nature, and in otherwise conflicting with the constitution.

(*b*) It is in conflict with Section 1 of Article XIV of the amendments to the constitution of the United States in that it conflicts therewith, wherein it abridges the privileges and immunities of the plaintiffs herein, and wherein it operates to deprive them of their property without due process of law and denies to them the equal protection of the law. Whereby a Federal Question is raised.

(*c*) Because the statute is in conflict with the same provisions of the Constitution of Texas which are inserted in Section 1 of the 14th Amendment to the Constitution of the United States.

(*d*) And furthermore, and not in limitation of the above, the plaintiffs represent that by Article 7414 of the Revised Statutes of Texas it is provided that Chapter 4 of Title 126 of the Revised Statutes (which Chapter relates to intangibles and an assessment of intangible values) attempts to bring within the jurisdiction of the State Intangible Tax Board and the methods provided for assessment by it "each and every incorporated railroad company, ferry company, bridge company, turn-pike or toll company doing business wholly or in part within the State of Texas, whether incorporated under the laws of this State or of any other State, territory or foreign country, and every other individual, company, corporation, or association doing business of the same character in this State," and whereby it is provided that they "in addition to the ad valorem taxes on intangible properties, which are or may be imposed upon them respectively by law, shall pay an annual tax to the State beginning with the first day of January of each year, on their intangible assets and property, and local taxes thereon to the counties in which this business is carried on, which additional tax shall be assessed and levied upon such intangible assets and property in the manner provided in this chapter."

This provision stands as enacted by the act of May 16th, 1907.

The effect of this statute is that there is a double taxation on the intangible properties, if any there be, of those subjected to the statute, if constitutional.

No such double ad valorem taxation is provided for in the laws of the State or permitted by the laws of the State as against the intangibles or other property of other persons or corporations not included within the terms of this statute. Whereby such statute pro-

vides for an unequal method, and whereby it is in conflict with the provisions invoked both of the constitution of the United States and of the State of Texas, and Section 1 of Article 8 of the Constitution of the State of Texas providing for equality and uniformity in taxation.

6 By the Statutes of the State of Texas provision is made for the assessment and collection of taxes upon all property upon the ad valorem principle whatsoever including all intangibles.

(e) By the provisions of Articles 7414 all corporations and individuals doing business in Texas are excepted from the provisions of Chapter 4 of Article 126 of the Revised Statutes of Texas, unless in Article 7414 included, and among the corporations and individuals so excepted are sleeping car companies, interurban railroad companies, stock car companies, all of which have stocks and bonds or stocks and would be within the machinery of the act, if included, but are excepted from the provisions of the act, although there is no basis of classification to except them. Whereby, in addition to the grounds stated above, it is now presented that there is by such statute denied to the plaintiffs the equal protection of the laws in conflict with Article 14 Section 1 of the Constitution of the United States and in conflict with provisions of the Constitution of Texas; and also that Receivers and property in the hands of Receivers is excepted from the law.

Wherefore, on these grounds as well as those elsewhere set out, the plaintiffs represent that the statute is unconstitutional and void; and that if valid, that the properties herein involved lie outside of its provisions.

It is now charged that the valuation of $10,743,223.00 made of and for the claimed intangibles of the I. & G. N. R'y, by the State Tax Board for the year 1915, as below particularly set out, did not exist in whole or in part; and that in finding that the same did exist, the board did not endeavor "to bring about a just, fair, equitable and lawful valuation," but did state the existence of intangible property which did not exist; and this without any basis, and against all evidence, and upon a deliberated plan to suppose the existence

7 of such fictional property; that the board did act for the purpose of subjecting to illegal taxation the properties of the I. & G. N. R'y and for the purpose of exacting and collecting out of the properties in possession of the plaintiffs, and under the security of tax liens and the preferences created by law, great sums of money, and because of the claimed intangibles.

And it is charged that the I. & G. N. R'y had and has no intangible values, but that if it had any intangible values (which is not admitted but denied) and has the same (which is not admitted but denied), then that these intangible values were of no such value and existed in no such amount as found by the State Tax Board, but were of far less value and far less amount than found by it; and that plaintiffs were grossly discriminated against in the valuation thereof by discriminations in favor of other and competing railroads,

arbitrarily and willfully made. And it is now further charged that the board by a false formula, and by methods, which no reasonable mind could in good faith follow, and through gross error and mistake, as well as by deliberated plan, did find and assess at the mentioned sum the claimed intangibles of the I. & G. N. R'y for 1915.

(5) On May 17th, 1915, the State Tax Board addressed the I. & G. N. R'y a notice. Therein it was stated that the true value of the entire properties of the railway was found to be $43,938,033.00, and that the true value of its intangibles was $13,493,200.00.

(6) Upon receipt of this notice the plaintiffs caused the Tax Commissioner, Bagby, to be interviewed, whereupon he exhibited a formula by which he stated the above result had been reached. In this formula the capital stock, at par, was added into the mortgage debt (stated to be $31,003,500.00, instead of as in the formula below, $26,181,500.00), as well as valued, as stated below, and the true value of all of the properties was stated to be $43,938,033.00, and the physical value $30,444,833.00; and the intangible value the
8 difference, or $13,483,200.00; but upon the pointing out of this error, he delivered to the plaintiffs a revised calculation, of which the following is a copy:

"International & Great Northern Ry. Co.

Gross Receipts, 1911	$9,782,165	
1912	11,254,327	
1913	10,902,041	
1914	9,645,785	
Total		$41,584,318
$41,584,318 ÷ 4 =		10,396,079
Capital stock issued and outstanding	4,822,000	
Mortg. debt at par	26,181,500	
Total Capitalization		$31,003,500
$10,396,079 ÷ 31,003,500 =	33.53 Ratio	
—	12.50 " T. & P.	
33.53 ÷ 12.50 =	268.24	
$4,822,000 × 268.24	$12,934,533	
Mortg. debt at par	26,181,500	
True value		$39,116,033
Physical value (assessed value)		28,372,810
Intangible value		$10,743,223"

(7) This last calculation has been adhered to by the board, and the board has declared the true intangible values of the I. & G. N. R'y to be $10,743,223, and has apportioned the same among the several counties on a mileage basis, apportioning to this county (having as stated 62-10/100 miles of this railway) $603,227.00 as the valua-

tion of intangibles taxable in this county. This apportionment of intangibles has been placed upon the assessment rolls and approved by the defendants constituting the Commissioners' Court and Board of Equalization, and carried into the books of the county and its collector. The rate of taxation in this county is $1.09½ per hundred dollars of valuation, which has been assessed and levied by the authorities of the State and by the Commissioners' Court of this county; whereby there is now carried into the books of the collector a claim by this county and on account of the State of the sum of $6,605.34 as having been assessed against such apportionment of intangibles; and which amount has been carried into the tax receipt claimed to be collectible from these plaintiffs and out of the property of the I. & G. N. R'y as a first lien and charge thereon; and the defendants are now insisting upon the payment thereof, and threatening to enforce its collection.

The intangibles found to be owned by other railroads have been by the board apportioned and certified.

(8) By the notice the I. & G. N. Ry. Co. was summoned to appear before the State Tax Board at Austin, Texas, to show cause why the valuation and appointment should not be made final, and why the same should be changed in whole or in part, or cancelled; and on the 18th day of June, 1915, plaintiffs appeared before the board, all of its members being present. They appeared to protest against the preliminary estimate, and for the purpose of insisting that there were no intangibles, and to show cause why the valuation should not be made final.

(9) At the hearing on June 18th, the plaintiffs, in writing and orally protested against the valuation made by the board, and introduced testimony and documents, showing, without contradiction that the preliminary estimate was erroneous.

The board was requested to explain its method of calculation, and why the "ratio" of the Texas & Pacific Railway entered thereinto, and to explain the method of applying that ratio, and to state what evidence it had to support its action; and it was explained to the board that earnest efforts had been made to understand the board's method, but that the plaintiffs and their employes had been unable to find any rational explanation.

The board refused to reply intelligibly and to make any comprehensible explanation, or to state the basis of its action. It was pointed out to the board that the capital stock of the I. & G. N. Ry. had been multiplied, in its calculation, 2,6824, and valued at $12,934,533 although (as was proved to the board) the decree of foreclosure had been entered, whereby, notwithstanding the stock was being eliminated and the properties sold out, it was valued by the board at a premium of $8,112,533; but it was proven to the board that the road was insolvent, and the stock worth nothing.

(10) At the hearing no evidence was offered in support of the board's action, and no reason given therefor; but the

plaintiffs proved without dispute, among other things, the following facts all now alleged to be true:

(*a*) That the amount of the principal capital liabilities, in outstanding stock and bonds of the railway, on December 31, 1914, was $31,003,500, including equipment notes and certificates, not counting the bonds pledged or held in the treasury, but counting the par of the notes for the security of which bonds were pledged; and that the total of these stocks, bonds and equipment notes on that date, including liens on its property, was $32,154,000, of which $4,822,000 par was in stock; and that the valuation of the Railroad Commission of Texas of the properties was, at the time of the hearing, $32,471,027.05, to which might be added additions and betterments, not then valued by the Commission, of the book cost of $1,542,065.02.

(*b*) That the railway had paid interest at 6% on the First Mortgage Bonds amounting to $11,290,500. now outstanding, this mortgage having been issued in 1879 on the properties, but that its last semi-annual interest, accruing May 1st, 1915, had to be paid by the issue of Receiver's Certificates; and that the second mortgage on the properties, known as the First Refunding Mortgage, had been foreclosed in the Federal Court, in May 1915, and that its interest on the Refunding Mortgage was in default when the receivership was taken out, and had remained in default ever since.

(*c*) That the board was placing a premium upon the capital stock of $8,112,533, which stock was in process of elimination, and worthless.

(*d*) It was proved that the International & Great Northern Railroad Company (whose properties were acquired by the I. & G. N. Ry.) had been foreclosed by foreclosure of its second mortgage of 1881; and the unsecured debt, over $7,000.00, besides the Third Mortgage Bonds of approximately $3,000,000 principal, besides interest, and a total stock capitalization of $9,755,000. had
11 been wiped out by the foreclosure of 1910-1911 and the sale thereunder.

(*e*) There was submitted to the board a correct statement of the gross income, operating deductions, net income and income valuations (but deducting nothing for capital charges) on the basis of 7% for the years 1912, 1913 and 1914, from which it appeared that for the calendar year of 1914 there was a net income above operating expenses of $65,405 capitalizing at 7%, $934,361; and for the calendar year of 1913, $1,156,660.92 capitalizing at 7% $16,523,727.43; and for the calendar year 1912, $2,084,149.50 capitalizing at 7%, $29,773,564.28.

(*f*) It was shown that $1,422,000 of the stock of the railway was common, on which no dividend had been paid, and that only one dividend had been paid on the preferred stock, viz: 5% for the fiscal

year ending June 30th, 1912 and that that fiscal year and the calendar year of 1912 were the best years in the history of the railway or of the properties thereof; and that in their whole experience the properties had not earned an income, on the average, on the Railroad Commission valuations.

(*g*) It was shown that the taxes of the properties had increased from for 1904, $127,304.81 to for 1914, $371,420.22, including elements of correction of not over $2,000. per annum, and that the properties had not been sunstantially extended since in 1904-1905.

(11) The Texas & Pacific Railway Company extends from New Orleans, Louisiana, through the State of Texas, to El Paso, having various branches, and being a great railway, and in a more prosperous condition than the I. & G. N. Ry. For 1914, the State Tax Board found its intangible values as follows:

12 "State Tax Board, Austin, Texas.

"Texas & Pacific Railroad Co.

Gross receipts, 1911	$11,079,618	
1912	12,341,684	
1913	12,381,305	
1914	11,745,562	
Total		$47,548,169
$47,548,169 ÷ 4 =		11,887,072
Stock issued and outstanding	$38,763,810	
Bonded Debt:		
1st Mortg. (Par)	24,992,975	
1st Mortg. "	4,970,000	
2nd Mortg. "	24,987,036	
	$54,950,011	
Secured Int. accrued	1,498,500	
Total	$56,488,511	
Total Capitalization		$95,212,321
$11,887,042 ÷ 95,212,321 = 12.48		
Ratio 38,763,810 × 12.50—Val. Stk.	$4,845.476	
Lien Obligations	56,448,511	
True Value, Texas Share—$61,293,-987 × 57.60		35,305,336
Physical Value		15,588,147
Intangible Value		$19,717,189"

The Railroad Commission valuation of this road is $35,689,067.29. The valuations of the Commission take no account of intangibles. This road is a competitor of the I. & G. N. Ry.

(12) The board adopted the formula applied in the case of the Texas & Pacific Railway as its general basis and scheme for determining values of Texas railroads and their intangibles for the year 1915, and applied such formula to the I. & G. N. Ry. as appears above, and to the other railroads in general.

(13) At the time of the hearing the formulas used for other railroads were not assessable, and the Tax Commissioner, the Secretary of the Board, thereafter refused to permit the same to be examined by plaintiffs, but they have been obtained.

(14) Other testimony was introduced before the board, and an offer then made by the plaintiffs of all the information in their possession, and request made to the board to completely inform itself before finally ruling. But it refused to do so.

(15) By the Act of 1891, carried as amended into Revised Statutes of Texas, Chapter 15, Title 115, The Railroad Commission of the State was created, and extensive powers bestowed on it, amongst others, to fix rates, as it has done.

13 By Article 6666 etc. the Commission is empowered to ascertain the cost and reproduction cost of the railways, and the Commission has made a valuation of the railways and of the I. & G. N. Ry.

(16) The aggregate of the stocks and bonds of the I. & G. N. Ry. is less than the aggregate of the valuations of the Railroad Commission; and this aggregated valuation was stated on the hearing to the board, and has been published and was well known to it. All of the stocks and bonds have been issued under the regulations of law and the orders of the Railroad Commission of Texas.

(17) The I. & G. Ry. properties have never paid an income on their aggregated value as fixed by the Railroad Commission, during the last 15 years, with the exception of one year, and this fact was proved to the board.

(18) The State Tax Board had no data whatever authorizing the valuation found, and did not make such valuation on any data, but against all data and all evidence.

(19) The Railroad Commission's valuation of the I. & G. N. Ry. properties, now owned by it, but as existing in 1901, was $17,319,036.60, and the valuation has been increased from time to time to the present valuation of $32,471,027.05 including the fiscal year ending June 30, 1901, and the fiscal year ending June 30, 1914, the average net income over such period, 1901-1914, inclusive (that is, income available for interest, dividends additions, betterments) amounted to .0387 on the Railroad Commission's valuations, (R. 218).

(20) The formula used by the board in application to the Texas & Pacific Railway was the basic formula used by it generally in finding intangibles for other railroads in Texas, and as illustrated in its application in the formula used for the I. & G. N. Ry. except that the board made various arbitrary distinctions in favor of other railroads, competitors with the I. & G. N. Ry. and in favor of other railroads in the State of Texas having competing relations with the rail
14 connections of the I. & G. N. Ry. and in favor of railroads in the State of Texas, generally. The formula in itself was inherently erroneous, and necessarily brought about great discriminations against the I. & G. N. Ry.'s properties whereby necessarily great discriminations were made against it and in favor of other railroads. The board was aware of the fact that the physical valuations of the property made by the State Railroad Commission were made with greater facilities, and were more reliable than any valuations it could make.

(21) The method adopted by the Tax Board for the Fort Worth & Denver City Railway was the following:

"Fort Worth & Denver City Ry. Co.

Gross receipts	1911	$4,851,084	
" "	1912	5,074,822	
" "	1913	5,100,503	
" "	1914	4,984,346	
Total			$20,010,755
$20,101,755÷4=			5,002,688
Capital Stock issued and outstanding		9,375,000	
Lien Obligations		8,621,418	
Total Capitalization			17,996,418
$5,002,688÷17,996,418=	27.79	Ratio	
	12.50	" T. & P.	
27.79÷12.50=	222.32		
True Value			21,009,850
Physical Value			11,245,840
Intangible Value			$9,764,010

This railroad is one of the most prosperous in the State, extending from Ft. Worth to New Mexico, with a mileage of approximately 454 miles. Its net operating income was for 1914, $1,205,061.60. and for 1913, $1,589,150.72. If the board had carried out its formula and multiplied the stock by 2.2232, and then added the lien obligations, a value would have been reached of $29,463,918, from which, making the deduction of the physical value stated by the board, there would have been intangibles of $18,218,078; but notwithstanding the prosperous condition of this road, the board refused

to follow its own formula as applied to the I. & G. N. Ry. and grossly discriminated as between it and the I. & G. N. Ry. on the formula.

15 (22) The board's method and results as to the Fort Worth & Rio Grande Railway Company were as follows:

"Fort Worth & Rio Grande Ry. Co.

Gross Receipts,	1911	$948,334	
" "	1912	933,296	
" "	1913	848,621	
" "	1914	807,806	
Total			$3,538,057
$3,538,057÷4=			884,514
Capital Stock outstanding		2,928,300	
Bonded Obligation		4,467,000	
Total Capitalization			$7,395,300
$884,514÷7,395,300=11.96 Ratio			
12.50 " T. & P.			
11.96÷12.50 95.68			
$2,928,300 95.68 Actual val.		2,801,797	
Bonded Obligations at 50¢		2,233,500	
	(Pen Memo.:		4,158,752)
True Value			$[5,035,297]*
Physical Value			3,717,212
	(Pen Memo.:		441,540
			$[1,318,085]*

(Assess at $2,000 per mile) Pen Memo.:

$$\left\{\begin{array}{r} 220.77 \\ 2000 \\ \hline \$441,540.00 \text{ Memo.} \end{array}\right\} 2$$

Whereby and by the T. & P. formula it appears that although this Railroad has a "ratio" less than that of the T. & P. one-eighth of the value of the par Texas & Pacific stock is found against it, and nearly the whole of the par of the stock of this road is assessed against it. But it further appears that the bonded obligations were valued at one-half, whereas the I. & G. N. obligations were valued in full.

(23) The board applied its formula to the Galveston, Houston & San Antonio Railway as follows:

[*Figures enclosed in brackets erased in copy.]

"Galveston, Harrisburg & San Antonio Ry. Co.

Gross Receipts, 1911		$11,055,937	
" "	1912	12,245,649	
" "	1913	12,155,333	
" "	1914	11,982,345	
Total			$47,439,264
$47,439,264÷4=			11,859,816
Capital Stock		27,084,400	
Lien Indebtedness		36,364,661	
Total			63,449,061
$11,859,816÷63,449,061=	18.69 Ratio		
	12.50 " T. & P.		
18.69÷12.50	149.52		
$27,084,400×149.52=		40,496,595	
Lien Indebtedness		36,364,661	
True Value			55,064,200
Physical Value			29,435,000
Intangible Value			$25,629,200."

16 This road is one of the chief competitors of the I. & G. N. Ry. Having applied the formula, it was found to work out a "true value" of $76,861,256, from which the board deducted $21,797,056 arbitrarily. The mileage of this railway is 1,326.26 miles. Its capital stock and lien indebtedness, as found by the board, was $63,449,061, and its capital stock is proportionally less burdened by lien indebtedness than that of the I. & G. N. Ry. and it is far better equipped and more prosperous and valuable; but the board made this gross discrimination in favor of this competing road.

(24) The board applied its formula to the Gulf, Colorado & Santa Fe Railway Company as follows:

"Gulf, Colorado & Santa Fe Ry. Co.

"Entire Line.

Gross receipts, 1911	$12,606,595		
1912	13,855,806		
1913	[11,446,144]*	14,408,592	
1914	15,681,050		(Memo.)
Total			53,589,565
$53,589,565÷4=			13,397,391

Total Mileage, 1,937.07.
Texas Mileage, 1,773. Texas %, 91.57.

[*Figures enclosed in brackets erased in copy.]

Cap. Stock, issued and outstanding....	4,560,000	(Memo.)
Texas Share	4,173,000	1,410.84
		70.24
Mortgage Debt	21,310,000	59.56
		70.24
Other Secured Indebtedness	28,836,394	94.55
Total	50,146,394	1,705.43
$50,146,394×91.57	45,919,053	Texas Share
Texas Share Stock	4,173,000	
Total Cap.	$50,092,053	
$13,397,391÷50,092,053=26.74 Ratio.		
—12.50 "	T. & P.	
26.74÷12.50..... 213.92		
$4,173,000×213.92	8,926,882	
Value Mtg. Debt.	45,919,053	
True Value		$54,845,935
Physical Value		29,047,033
Intangible Value		$25,798,902
(Pen Memo.)		
225 miles additional		
at 13,800 for..... 23,374		
22,565,622		
		54,845,935
		32,280,313
		22,565,622"

This railroad is one of the chief competitors of the I. & G. N. Ry., is more valuable, and its net and operating income have been and are far better than that of the I. & G. N. Railway Company.

17 (25) By its formula applied by the board to the Houston East & West Texas Railway Company, a competitor of the I. & G. N. Ry. the results reached were as follows:

"Houston East & West Texas Ry. Co.

Gross Receipts,	1911	$1,315,135	
	1912	1,336,345	
	1913	1,440,492	
	1914	1,410,766	
Total			$5,502,738

$5,502,738÷4		1,375,684
Bonded Debt at Par	3,000,000	
Unpaid Interest	26,550	
Capital Stock issued and outs	1,920,000	
Total Capitalization		$4,946,550

$1,375,684÷4,946,550=27.80 Ratio.
—12.50 " T. & P.
27.80÷12.50 222.40

$1,920,000×222.40	4,270,080	
Bonded Debt at Par	3,000,000	
Unpaid Interest	25,500	
True Value	6,295,580	
Physical Value	4,068,525	
Intangible Value	$2,227,055"	

Applying this formula, it was found that this road would have the value of $7,295,580, but the board reduced its valuation by $1,000,000 in gross discrimination in favor of this railroad, as compared with the I. & G. N. Ry. Co., and furthermore, grossly discriminated in favor of it by giving it a physical valuation far above the Railroad Commission's valuation, which is $2,767,288.37, thereby violating its formula in favor of this road by approximately $2,350,000. The Houston East & West Texas Railway is more prosperous than the I. & G. N. Ry.

(26) The board applied its formula to the Houston & Texas Central Railroad, as follows:

"Houston & Texas Central R. R. Co.

Gross Receipts, 1911	$6,317,262	
1912	6,351,639	
1913	6,847,872	
1914	6,604,202	
Total		$26,120,975
$26,120,975÷4=		6,530,243
Secured Indebtedness at Par:		
Mortgages	12,570,000	
Accrued Interest	173,835	
Total	12,743,825	
Capital Stock, par	10,000,000	
Total Capitalization		22,743,825

18

$6,530,243÷22,743,825=28.71 Ratio.		
—12.50 " T. & P.		
28.71÷12.50..... 229.68		
$10,000,000×229.68	22,968,000	
Lien Obligations, par	12,570,000	
True Value		$35,538,000
Physical Value		22,548,992
Intangible Value		$12,989,008"

This road is one of the most important of the Texas Railroads, and an active competitor of the I. & G. N. Ry. It has a mileage of 784 miles, and is far better improved and more valuable, mile for mile, than the I. & G. N. Ry. Its lien indebtedness is about $16,000 per mile, while that of the I. & G. N. Ry. is not less than $24,000 per mile. The Railroad Commission's valuation is $18,440,938.68, whereas the board *is* deducted a far greater valuation.

(27) The board applied its formula to the Missouri, Kansas & Texas Railway Company of Texas, as follows:

"Missouri, Kansas & Texas Ry. Co. of Texas.

Gross receipts, 1911	$10,850,778	
1912	12,159,019	
1913	12,632,572	
1914	13,290,510	
Total		$84,932,879
$48,932,879÷4=		12,233,219
Capital Stock outstanding.....	10,152,500	
Bonds at par	37,947,154	
Total Capitalization		$48,099,654
$12,233,219÷48,099,654=25.43 Ratio.		
12.50 " T. & P.		
25.43÷12.50..... 203.44		
$10,152,500×203.44	20,654,246	
Bonded Obligations	37,947,154	
	Pen Memo.	57,260,671
True Valuation		[58,601,500]*
Physical Value		37,116,181
Intangible Value		[21,485,219]*
(Pen Memo.)	Pen Memo.	20,144,490

[*Figures enclosed in brackets erased in copy.]

1911..... $20,567,033
1912..... 19,629,750
1913..... 20,751,450
1914..... 19,629,750

4) 80,577,983 (20,144,490
8

05"

and found thereby its true value to be $58,601,500, which it afterwards arbitrarily reduced over $1,000,000. The Railroad Commission valuation of this road is $27,072,910.11, but this physical valuation the board raised in its favor over $10,000,000 whereby the M. K. & T. Railway was grossly favored in comparison with the I. & G. N. Ry. This is a larger railroad than the I. & G. N. Ry., having a much greater mileage; and is one of its main competitors.

(28) The board applied its formula to the St. Louis, San Francisco & Texas Railway as follows:

"St. Louis, San Francisco & Texas Railway Co.

Gross Receipts, 1911	$1,239,092	
1912	1,444,327	
1913	1,539,919	
1914	1,304,191	
Total		$5,527,529
$5,527,529÷4=		1,381,882
Capital Stock	804,000	
Lien Indebtedness	1,188,000	
Total		1,992,000
$1,381,882÷1,992,000=69.37 Ratio.		
12.50 " T. & P.		
69.37÷12.50..... 554.96		
$804,000×554.96	4,461,878	
Lien Indebtedness	1,188,000	
True Value		$5,649,878
True Value (R. R. Com.)		2,000,000
Physical Value		2,000,000
Intangible Value		.....

(Pen Memo. 'See.')"

The Railroad Commission's valuation of this property is $2,720,-861.20, but the board refused to follow its formula, and arbitrarily wiped out an intangible valuation on its formula of $3,648,878.

(29) The board applied its formula to the St. Louis Southwestern Railway of Texas, as follows:

St. Louis Southwestern Ry. Co. of Texas.

Gross Receipts, 1911	$4,460,000	
1912	4,875,000	
1913	5,042,118	
1914	4,218,100	
Total		$18,595,218
$18,595,218÷4=		4,648,804
Capital stock outstanding	2,750,000	
First Mtg. Bonds	10,677,000	
Second " "	5,052,500	
Total Capitalization		$18,479,500
$4,648,804÷18,479,500=25.12 Ratio.		
12.50 " T. & P.		
First Mortg. 5% bonds at par	572,000	
Second Mortg. 4% @ 85¢	8,038,250	
" " Inc. Bonds @ 70¢	2,567,500	
Total	12,177,750	
Capital stock	2,750,000	
	(Pen Memo.)	14,232,540
True Value		[14,927,750]*
Physical Value		10,408,885
	(Pen Memo.)	$3,823,655
Intangible Value		[4,518,865]*

20

S. P. Ross ..... advisement
(Pen Memos.)
Fix value of Ing. at 5,500=3,823,655.
695.21
5500

34760500
347605

3,823,655.00"

[*Figures enclosed in brackets erased in copy.]

The board disregarded the formula in comparison with its application as to the I. & G. N. Ry. by failing to value the bonded indebtedness at par, as was done in the case of I. & G. N. Ry. This railroad is an active competitor of the I. & G. N. Ry.

(30) The board applied its formula to the Texas & New Orleans Railway, as follows:

"Texas & New Orleans R. R. Co.

Gross receipts, 1911	$3,984,275	
1912	4,407,520	
1913	4,371,085	
1914	4,092,073	
Total		$16,854,953
$16,854,953÷4=		4,213,738
Capital Stock outstanding	5,000,000	
Mort. Debt. par	10,039,195	
Secured Int. unpaid	192,779	
Total Capitalization		$15,231,974
$4,213,738÷15,231,974=27.66 Ratio.		
12.50 " T. & P.		
27.66÷12.50 221.28		
$5,000,000×221.28	11,064,000	
Mortg. Debt & Int.	10,230,954	
True Value		$21,294,954
Physical Value		14,293,990
Intangible Value		$7,000,964"

The Railroad Commission's valuation of this property is $12,793,171.13, but a far greater physical valuation was given by the board, and the advantage thereof given to this road which is an important competitor of the I. & G. N. Ry.

(31) The formula was applied by the board rigidly against the I. & G.N.Ry.and necessarily working a grossly erroneous result as against that railway, but was not applied by the board rigidly against competitors and taxpaying railroads, but by gross partiality the formula was modified and its results changed and other discriminations made in favor of the competitors of the I. & G. N. Ry. and taxpaying railroads and other subjects of the board's action; not only as has been specifically set out above, but also otherwise, and in its
21 application to the properties generally subject to the board's jurisdiction, whereby as between the I. & G. N. Ry. and its competitors, and railroads and said properties in general, there has been a gross discrimination and a vast over-valuation of the intangibles of the I. & G. N. Ry. as in comparison with its competitors and railroad taxpayers and said properties in general, if such intangibles

existed, which is not admitted, but denied. The roads mentioned are the chief railroads of the State, doing, with the I. & G. N. Ry., not less than nine-tenths of the rail carriage of Texas.

(32) The scheme and methods of the Tax Board were adopted with the purpose of not fairly finding the values of any intangibles of the I. & G. N. Ry. (there being none), but of creating fictitious values when there were no intangibles, the board well knowing and being bound to know that its finding was incorrect; and it is now charged that it did by false formula (which no reasonable mind could adopt or follow) in gross error, make the valuations alleged, using methods which the members of the board as reasonable men must have known were unfounded, unreasonable and unjust; and applying such formula with a gross partiality as against the plaintiffs, and in favor of their competitors and tax paying railroads and properties subject to the board in general; but also as a general scheme against railroads generally to find intangibles which did not exist, as was generally done.

(33) Wherefore, the plaintiffs say that the valuation attacked was wrongfully and illegal, and was a valuation of property not existing, and subject to this, that, if any intangibles existed they did not exist in the amount claimed, and that if they existed at all (which is denied) they did not exist in amount over $50,000; and furthermore, that such valuation of intangibles (the existence of which is not admitted, but denied) was made in gross discrimination against the I. & G. N. Ry. and grossly in favor of its competitors, other railroads and taxpayers. This discrimination against the I. & G. N. Ry. in the valuation of its intangibles, if any existed (which is not admitted, but denied) being in valuing them at not less than four times as much as the same values in tangibles of its competi-
22 tors, and other railroads and taxpayers, and each of them, were valued at.

(34) Wherefore, the plaintiffs invoke the Constitution of the State of Texas and the laws of Texas against this illegal valuation and assessment, and also Section I of Article XIV, of the amendments to the Constitution of the United States of America, in bar of the taxation now attacked and the valuation made by the board, and represent that if the court does not intervene, the property will be illegally taken and diverted, to the extent of such illegal taxation, from its lawful owners or the persons entitled thereto; and that taxes will be levied and taken without due process of law, and in violation of the equal protection of the law.

Whereby a Federal question is now raised.

(35) The defendants announce and claim that they will endeavor to collect from the plaintiffs the amount of $6,605.34, which has been assessed as the tax due the State of Texas and the county on the claimed intangible valuation apportioned to this county.

(36) The plaintiffs now offer and tender to the defendant collector the whole amount of taxes due by them in this county, less the

taxation on the intangibles, to-wit: the sum of $16,960.49, and do not demand therefor a receipt in full from the defendants but only a receipt for the amount paid, which, however, the plaintiffs insist is all that is due, leaving it open to the defendants to litigate the subject-matter of this suit; and the plaintiffs allege that they did offer to pay such sum of money, but that the defendant Tax Collector has received same, and stated that he would receive it if tendered. And the plaintiffs Receivers of the I. & G. N. Ry. Company, did offer to pay the same to the Tax Collector on and before the trial of this suit, and before February 1st, 1916, and did make payment to the collector before February 1st, 1916.

III.

The plaintiffs affirm all of their foregoing pleadings, and maintain that there were no intangibles to be assessed, and furthermore, that if any intangibles existed (which is not admitted, but denied) then that they did not exist in any amount found by the Tax Board, but were of very small amount, not over $50,000; and furthermore, that if any intangibles existed, they were valued upon the wrong principles, and gross discrimination systematically and willfully used in favor of other railroads and taxpayers and in favor of railroads which are competitors with the I. & G. N. Ry.

But, subject to all of the above, the plaintiffs further represent as follows:

(1) There exists in this county a scheme, custom, use, design and understanding, participated in by the defendants, and each of them, and the Tax Assessor, and by the defendants composing the Board of Equalization and Tax Assessor, which scheme was in operation generally as to property throughout the county for the year 1915, and for several years prior thereto, whereby it was agreed or understood or permitted that the property taxable within the county should be assessed, valued, equalized and placed on the tax rolls for taxing purposes at not exceeding 38 per cent of its true value and of its true cash and market value, and far below the same, with the exception that the intangibles if any, of railroads should be valued as certified by the State Tax Board, and with the further exception that large amounts of money and of notes and accounts, stocks, bonds and loans, and bills receivable, household furniture subject to taxation and other personal property were understood, agreed and permitted not to be taxed at all, and the taxation thereof was purposely permitted to be avoided, except as to relatively small amounts, the system being to permit this class of capital to escape taxation, and with the further exception that the tangibles of this railroad taxable in this county were assessed and valued at a higher rate than the rate adopted for the valuation of the tangibles of other property taxable in this county; and that not less than ½ of the property in this county, subject to taxation, thereby escapes all taxation.

The acts of the defendants, constituting the Board of Equalization

and the County Court, in equalizing or purporting to equalize the values of property for taxation, and in modifying and finally adopting as so modified the rolls of the Tax Assessor for 1915, containing the claimed intangible assets valued as stated above, and the valuations of other property, undervalued as stated above; and such undervaluations on the part of the Assessor and on his part in receiving the same; and on the part of the Board of Equalization, and the defendants composing that board, and on the part of the Assessor and the board in permitting the moneys, notes, bonds, accounts and loans to escape assessment and taxation, were intentional and arbitrary.

By these acts and failures to act the plaintiffs were unjustly, arbitrarily and illegally discriminated against, if the I. & G. N. Ry. had any intangible values at all, which is not admitted, but denied. This process was in pursuit of a scheme participated in by persons rendering their taxes, and authorized, permitted and carried into effect by the acts and non-action and conduct of the defendants and Assessor to the best of their ability, and by each of them, and the assessments and valuations for the year 1915, and levying taxes on the property taxable in this county, have been generally made and done in these ways.

(2) Wherefore, adhering to their previous contentions and subject to the same, the plaintiffs maintain that if the I. & G. N. Ry. has any intangibles in value to the amount found by the State Tax Board, and apportioned to this county, or less, then that the amount cannot be valued at their true value, but can be valued for taxation and taxes collected thereon*ly* only on the basis of the valuation of other property in this county, and that the valuation of such intangibles, if any, must be reduced to such basis and to the general average of valuations, and that there should also be taken into consideration failure and refusal to value certain properties.

(3) Wherefore, the plaintiffs invoke the Constitution of the State of Texas and the laws of Texas against such illegal valuations, assessment and discrimination, and also Section I, of Art. XIV, of the amendments of the Constitution of the United States of America, and represent that if the court does not intervene, the property will be illegally taken and diverted to the extent of the illegal taxation by reason of such discriminations, from its lawful owners of the persons entitled thereto, and that taxes will be levied and taken without due process of law, and in violation of the equal protection of the law.

Whereby a Federal question is raised.

IV.

Wherefore, upon all of the above, plaintiffs pray as follows:

(1) That the defendants be cited to answer.

(2) That the defendants be compelled by the process, injunction and mandate of this court to accept the taxes not contested.

(3) That the plaintiffs may have a temporary injunction restraining the defendants and each of them and their successors, and their agents and attorneys, from, in any way, attempting to collect the taxes herein in controversy, until the final deposition of this suit; and from, in any respect, asserting a claim thereto except in this forum; and from, in any respect disturbing the plaintiffs and harassing them by attempts to collect the taxes in dispute; and from attempting to fix liens on or burden the properties of the I. & G. N. Ry. during this litigation; and from attempting to bring suits or doing anything to collect the same, otherwise than in this suit.

(4) Upon final trial, the plaintiffs, pray that they and each of them, and all persons entitled under or after them, have a decree forever enjoining and prohibiting the defendants, their successors and employes and attorneys, and any person holding under or claiming by or through them, and all other persons whatsoever, from asserting any claim to the taxes herein in litigation, and from attempting to collect the same, and that such taxes be declared not to be due in whole and in part.

(5) In the event that the court should hold that some part of the taxes in controversy is due, but less than the amount claimed then the plaintiffs pray that the same may be ascertained and settled, and that the defendants, their successors, employes and attorneys be forever enjoined from collecting or attempting to collect the residue, ascertained not to be due; but they make this prayer without yielding their contention that none of the taxes in controversy are due and without yielding their contention that the same are all illegal and void.

(6) And further, the plaintiffs pray that every lien, cloud or burden existing for the security of the illegal taxes be removed; that they may have all such relief, general or special and of whatever kind, which may be their due and may be necessary to secure their rights in the premises; and that they have judgment for their costs.

WILSON, DABNEY & KING,
Attorneys for Plaintiffs.

Filed March 6, 1916, O. M. Duclos, Clerk District Court, Harris Co., Texas, by B. J. Witt, Deputy.

Defendants' Plea in Abatement & Original Answer.

Filed Mch. 6th, 1916.

In the District Court of Harris County, Texas.

No. 68800.

JAMES A. BAKER and CECIL A. LYON, Receivers of the International & Great Northern Railway Company, and The International & Great Northern Railway Company, Plaintiffs,

VS.

KARL L. DRUESEDOW, Tax Collector; W. H. WARD, Co. Judge, and W. H. Lloyd, County Commissioner; J. A. Smith, County Commissioner; W. H. Kiser, County Commissioner; D. Barker, County Commissioner, All of Harris County, Texas, Defendants.

Defendants' Pleas in Bar and Abatement; Demurrers; Answer.

27 To said Honorable Court:

I.

Come now the Defendants in the above styled and numbered cause and plead in bar, and in abatement, of the cause of action attempted to be pleaded by the Plaintiffs in pages three to paragraph 35, page 19, inclusive, and the first paragraph of Subdivision III, page 20, of their Petition, and the relief sought by the Plaintiffs upon such allegations, and say:

Heretofore on the 5th day of July, A. D. 1915, the plaintiffs in this cause, as Complainants, filed their bill in equity, styled Bill of Complaint, in the District Court of the United States for the Southern District of Texas, at Houston, Texas, said Bill of Complaint and cause being docketed in said court as Equity No. 65, Ancillary to Equity No. 49, wherein the Central Trust Company of New York was Complainant and the International and Great Northern Railway Company et al. were defendants in said ancillary suit No. 65 and the Bill of Complaint therein A. P. Bagby, Jr. Tax Commissioner of the State of Texas, H. B. Terrell, Comptroller of the State of Texas, and John G. McKay, Secretary of State of the State of Texas, constituting the State Tax Board, were named as defendants. In this connection defendants here say that said Bagby, Terrell and McKay, officers of the State, and composing the State Tax Board, as aforesaid, were but the nominal parties defendant in said suit, that they were, and could be suable only in their capacities as representatives of these defendants and of all other citizens of the State of Texas, and as representatives of the State of Texas, and that the State of Texas, these defendants, together with the Tax Collector of this county and all other citi-

zens of the State were the real defendant parties at interest, as appears from said Bill of Complaint and otherwise.

In said suit and Bill of Complaint, and the amendments thereunto duly filed, the plaintiffs herein,—Complainants there—presented to said Court substantially, if not identically, the same allegations as are contained in the portion of their petition herein described above, and praying thereon substantially if not identically, the same
28 relief as is herein sought upon said allegations, and especially praying for judgment restraining the Defendants (there) and all persons acting under or for them from certifying to the various tax assessors as provided by law, and apportioning among the various counties, the intangible values found by them to exist (being the same intangible values a part of which are complained of in the present suit) in connection with and as a part of the values of the International & Great Northern Railway Company, or any part thereof, or any intangible values, and further especially praying for judgment to forever prohibit and enjoin the defendants (there), individually and officially and as constituting the State Tax Board, their agents, employes, clerks, attorneys and successors, from certifying such intangible values or valuations which they have found to exist, or any value or valuation which this Court (that court) does not find to exist, to the Assessors of the various counties of the State of Texas into which the International & Great Northern Railway penetrates, and from taking any steps whatsoever in promoting of the certification and collection of taxes thereon or in aid of the collection of the taxes thereon."

To said Bill of Complaint the defendants (there) in due time filed their motion praying that the same be dismissed for want of equity, and for other reasons as will appear therefrom, and said motion was submitted to the court at the hearing mentioned hereinafter, and the court took the same under advisement to hear the evidence. Defendants (there) then filed and presented in due course their answer to the merits of said Bill of Complaint, traversing all of the issues of fact and of law in said Bill of Complaint contained, and praying that the restraining order theretofore granted in the cause "be dissolved, that Complainants be denied all relief prayed by them, that the cause be dismissed, and that they have and recover from the Complainants all costs in this behalf expended, and for such other relief to which they may be entitled."

29 Thereafter on the 15th day of July, A. D. 1915, said cause came on to be heard in said Court "on the Bill, Replication and Proofs", and, all parties having announced ready for trial, the same was so heard, and the pleadings having been read to the Court and considered by it, the evidence having been offered by the respective parties, and the same together with argument of counsel thereon having been considered by the Court, the Court on the 20th day of July, A. D. 1915, in said cause, entered its judgment which, omitting formal parts, reads as follows, to-wit:

"Above styled and numbered cause came on to be heard by the Court on the Bill, Answer, Replication and Proofs on the 15th day of July, A. D. 1915. The Court having heard and considered the

pleadings, evidence and argument of Counsel, is now, on this the 20th day of July, A. D. 1915, of the opinion that the prayer contained in the Bill of Complainants, praying that this Court enter an order "prohibiting and restraining" the defendants, "and each of them, from certifying to the various county tax assessors as provided by law, and apportioning among the various counties the intangible values found by them (defendants) to exist in connection with, and as a part of the values of the International & Great Northerin Railway Company or any part thereof or any intangible values until the further order of this Court, and pending this suit", and other relief, should be in all things denied.

"It is therefore ordered, adjudged and decreed by the Court that such prayer and application be, and the same is hereby in all things denied, to which action of the Court, the Complainants, in open court, duly excepted.

"It is further ordered, adjudged and decreed by the Court, that the defendants do have and recover of and from the Complainants all costs in this behalf incurred."

Although the Complainants in said cause duly excepted to said judgment, no appeal was perfected by them, and no writ of error was sued out by them, and said judgment became, and is, a valid final judgment of a court of competent jurisdiction acting within its authority adjudicating against the Complainants there,—plaintiffs here—all issues of fact and law there presented, including the issues of fact and law here presented in the portion of plaintiffs' petition described herein above.

In this connection, defendants show to the court that upon the application of the complainants in Equity Cause No. 65 said Federal Court, by its order entered July 5th, 1915, a copy of which is incorporated in said Bill of Complaint therein, thus construed the purpose of said suit:

"This day there was presented to the court the petition of the Receivers of the International & Great Northern Railway Company and of that Railway Company for permission to file an ancillary bill in this case for the purpose of restraining the further assessment and collection of taxes upon the intangible assets of the railway as claimed and as stated to be claimed by the State Tax Board composed of A. P. Bagby, Jr., Tax Commissioner of the State of Texas; H. B. Terrell, Comptroller of the State of Texas, and John G. McKay, Secretary of State of the State of Texas.

"And the court having considered the petition and the Central Trust Company of New York, Complainant, having appeared and assented thereto and joining in the request that this order be entered, and the petition be granted, (and being represented before the court its Solicitors of Record, Messrs. Baker, Botts, Parker & Garwood and the court being advised, and being of the opinion that the assessment of illegal taxes would cast a cloud upon the title of the property now in the possession of the court through the receivers, and that the payment of such taxes would involve a loss of large

Minnesota State Library,
St. Paul, Minn.

sums of money, if the same be illegal and illegally assessed, and the court being of the opinion that if a bill against the State Tax Board be not entertained, before the certification to the various counties of their finding, that it would be necessary to pay such taxes, or
31 to sue a great many persons, and the Tax Collectors and Tax Authorities of all of the numerous counties into which the railway extends, and the court being desirous to prevent the institution of a multitude of suits, and having jurisdiction of this case, as as ancillary suit, and on such other grounds as may appear, does now order:

"That the Receivers and the International & Great Northern Railway Company be authorized to file the bill for which they petition, and a copy of which is exhibited with their petition, except that this order is not inserted therein, and to pursue the litigation proposed in such Bill in this court without regard to the amounts involved, or to the residences of the parties, and on such terms and conditions as this court may further order."

Wherefore defendants say that the cause of action, or part thereof, attempted to be set up in the portion of Plaintiffs' Petition hereinabove described should be held to be res adjudicata and, therefore, its assertion here as a ground for relief, should be held to be barred, and such portion of the petition should be by the court stricken out, and for such relief defendants pray.

Defendants tender proof upon the allegations of this plea in bar; and in this connection defendants show to the court that the plaintiffs are now in possession of authentic copies of said bill of complaint and amendments thereto filed, and offered to be filed, and they are hereby notified to produce the same in this court upon hearing hereof, else other evidence thereof will be offered by defendants; plaintiffs are also hereby notified that upon the hearing hereof, defendants will offer in evidence authentic or certified copies of the answer of the defendants in said equity cause No. 65, and of the orders of the court entered therein.

SEWALL MYER,
County Attorney,
Harris County, Texas;
B. F. LOONEY,
Attorney General;
LUTHER NICKELS,
Assistant Attorney General,
Attorneys for Defendants.

32 Sworn to and subscribed before me, by Luther Nickels, this the 5th day of February, 1916.

[SEAL.] W. P. DUMAS,
Notary Public, Travis Co., Texas.

II.

Come now the defendants in the above styled and numbered cause and plead in bar, and in abatement of the cause of action or portion thereof, attempted to be set up by plaintiffs in numbered paragraphs "(1)", "(2)" and "(3)" of Subdivision III pages 20 and 21 of their petition, and the relief sought by them thereupon, and say:

They adopt, in this connection, the matters and things set forth in Subdivision I hereof.

The substance of the allegations in this Subdivision described was presented as an issue, and was litigated, and adjudged against the plaintiffs herein in said Equity Cause No. 65. In this connection, defendants show unto the court that in numbered paragraph "(3)" of said Bill of Complaint, in Equity Cause No. 65,—the order of said Federal Court granting the plaintiffs permission to file said cause is set forth, and in it the following language appears: "This day was presented to the court the petition of the Receivers of the International & Great Northern Railway Company and of that Railway Company for permission to file an ancillary bill in this cause for the purpose of restraining the further assessment and collection of taxes upon the intangible assets of the railway as claimed and as stated to be claimed by the State Tax Board," etc.

One of the grounds for the injunction and relief there prayed for is stated in the Bill of Complaint to be that there were 'inequalities and irregularities in the methods of assessment between Complainants (plaintiffs here) and others' and that such inequalities and irregularities "were arbitrarily applied" and were brought about "by a set purpose and a reckless disregard of the rights of Complainants." (This charge appears in numbered paragraph "(24)" of the said Bill of Complaint.)

33 The allegation of said Bill of Complaint was intended to, and did, raise substantially, or identically, the same issues of fact and of law as those attempted to be presented by Subdivision III of the plaintiffs' petition herein, as will appear from a comparison of the petition with the bill of complaint, and especially so when so compared in connection with the orders of said Federal Court made in that cause.

The defendants in said Equity Cause No. 65, in their answer therein, addressed an exception to said allegation upon the ground of indefiniteness and uncertainty, which exception was not acted upon by, although presented to, said Court; and after introduction of evidence, upon the trial of that cause, had closed, the Complain-ts (plaintiffs here) presented to said court, with request for leave to file same, an amendment to their said bill of complaint making the aforesaid allegation more specific and expressly covering the issues of fact and law now presented in subdivision III of their petition herein. Said court considered said amendment, but refused to allow the same to be filed because, as defendants now allege, the complainants (plaintiffs here) had negligently delayed the filing of the same.

Upon the presentation of said amendment to said bill of complaint, said court entered an order reciting the fact that said amendment was offered "after the conclusion of the evidence and denying the application for leave to file the same.

Defendants cannot now plead, in haec verba, said proposed amendment for the reason that the same is now in the possession of the plaintiffs.

Notwithstanding the refusal of said court to permit the filing of said amendment, said court, by its failure to sustain the exception of the defendants in said cause referred to above, and under the general allegation of said bill of complaint, referred to above, gave the complainants (plaintiffs here) full opportunity to offer
34 such evidence as they cared to offer to sustain said allegation, and upon such issues they did introduce evidence.

And, as shown above in subdivision I hereof, upon the conclusion of the trial of said Equity Cause No. 65, said court resolved these, and all other issues of fact and of law there involved, against the complainants (plaintiffs here) by a valid final judgment rendered within the scope of the court's jurisdiction.

But, if defendants should be in error as to the actual litigation and adjudication of said issues of fact and law, in said Equity Cause No. 65, said issues are now, nevertheless res adjudicata because they properly belonged to the subject of litigation in said Equity Cause No. 65, and the complainants there (plaintiffs here), by exercising reasonable diligence, might have brought them forward at that time, in that cause, and have had them litigated. In this connection, defendants show unto the court that the purpose and object of said Equity Cause No. 65 as stated in the bill of complaint therein, and as stated in said Court's order of July 8th, 1915, was the "restraining the further assessment and collection of taxes upon the intangible assets of the railway (that is, the International & Great Northern Railway Company) as claimed and as stated to be claimed by the State Tax Board, etc." and to prevent the necessity of the complainants suing "the Tax Collectors and Tax Authorities of all the numerous counties into which the Railway extends", etc. It was alleged in said cause, as the bases for relief, that the intangible assets of the Railway had been excessively assessed and that by such excessive assessment complainants were discriminated against and that, therefore, the intangible assets valuation was void; to sustain this general charge the complainants, by the exercise of proper diligence, could have presented the reasons now presented in subdivision III of their petition in this cause, and if such reasons are sufficient here, they would have been sufficient in Equity Cause No. 65, to sustain said general charge and to establish the illegality of the assessment
35 upon said intangible values; Plaintiffs, having then when they had full opportunity, failed to present said reasons, if they did fail to do so,—are estopped and precluded from presenting them in this cause.

Wherefore, defendants say, the issues of fact and law presented in Subdivision III of the plaintiffs' petition are res adjudicata, the same should be stricken from the petition, and the plaintiffs should be

held barred and estopped from now presenting them as a basis for relief in this cause, and for such relief defendants pray.

Defendants hereby notify plaintiffs that upon the hearing hereof it will offer proof of the pleadings, julgment and orders in said Equity Cause No. 65, and they are hereby notified to produce such original or authentic copies thereof as may be in their possession and especially of the proposed amendment to their aforesaid bill of complaint in Equity Cause No. 65, referred to above.

SEWALL MYER,
County Attorney, Harris Co., Texas;
B. F. LOONEY,
Attorney General;
LUTHER NICKELS,
Assistant Attorney General,
Attorneys for Defendants.

Sworn to and subscribed before me, by Luther Nickels, this the 5th day of February, 1916.

[SEAL.]

W. P. DUMAS,
Notary Public, Travis Co., Texas.

III.

Wherefore, by reason of the matters set forth in subdivisions I and II hereof, this cause should be dismissed, with costs of suit against plaintiff, and for such relief, defendants pray.

That, in addition to the above and foregoing pleas in abatement, these defendants say that this cause of action should and ought to abate, for the following reasons, to-wit:

(A) Because plaintiffs have an adequate remedy at law, and because there is no threatened injury which will result in irreparable damage to plaintiffs.

36 (B) Because this suit is, in effect, a suit against the State of Texas, and permission has not been given by the State of Texas to the plaintiffs to file this said suit.

Wherefore, these defendants say that this suit should abate be dismissed and held for naught.

B. F. LOONEY,
Attorney General, State of Texas.
LUTHER NICKELS,
Assistant Attorney General, State of Texas.
SEWALL MYER,
Attorney for Harris County.

STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared Sewall Myer, known to me to be one of the attorneys for the defendants in the above entitled and numbered cause, and being

by me on oath duly sworn, deposes and says that the facts set forth in the last two grounds for abatement, above set forth are true.

SEWALL MYER.

Subscribed and sworn to before me, this the 8th day of February, A. D. 1916.

[SEAL.] JNO. H. FREEMAN,

Notary Public in and for Harris County, Texas.

IV.

Subject to the above, defendants demur generally unto the allegations of plaintiffs' petition, and say that the same are insufficient in law or equity to entitle plaintiffs to the relief prayed,—and of this they pray judgment.

V.

Defendants except to the allegations contained in Subdivision II of plaintiffs' petition, and say that the same are insufficient to entitle the plaintiffs to the relief prayed,—and of this they pray judgment.

VI.

Defendants except to the allegations contained in Subdivision III of plaintiffs' petition and say that the same are insufficient
37 to entitle the plaintiffs to the relief prayed,—and of this they pray judgment.

VII.

Defendants especially except to the allegations of subdivision II of plaintiffs' petition and say that the same are insufficient and immaterial, for that:

1st. The purpose of the State Tax Board is immaterial, unless it is intended thereby to allege fraud upon the part of said Board and its members; and

2nd. If it is intended to allege such fraud, the allegations are insufficient, and too uncertain and indefinite, to show such fraud, or to notify defendants of facts to be proved,—and of this defendants pray judgment.

VIII.

Defendants especially except to the allegations contained in subparagraphs (5), (6), (8), (9), (10) and (11) to (20) inclusive, of subdivision II, and each of them, for the reason that the facts alleged, if true, are immaterial, and because the proceedings before the Tax Board, and the formulas used by it, are immaterial, because the only issue presented by this subdivision of the petition is whether or not the intangible values of the I. & G. N. Ry. Co. equal, exceed,

or fall short of the sum of $10,743,223, and if such values do not equal said sum, then by how much do they exceed or fall short thereof,—and of this defendants pray judgment.

IX.

Defendants especially except to the allegations contained in subparagraphs (21) to (32), inclusive of subdivision II of plaintiffs' petition, and each of them, and say that they, and each of them, are insufficient for that:

1st. There is no allegation that the mere use of the formulas used in each of the cases mentioned, of itself, produced any discrimination against plaintiffs, or caused its properties to be excessively valued;

38 2nd. There is no allegation that the intangible values found by the Tax Board, with respect to any, or all, of the Railway Companies mentioned in said paragraphs — substantially less than the real intangible values thereof;

3rd. The statutes of the State required the Tax Board to adopt different methods of calculations, as to different railroads, accordingly as the facts and conditions, as to different railroads, required or seemed to require, and in adopting the formulas complained of, and in changing them as to different railroads, if this was done, the Tax Board was but exercising a sound discretion vested in it by law, and but performing the duties laid upon it by law, to adopt such method of valuing the intangibles of any particular railroad as the facts peculiar to the road, and justice, indicated should be adopted. And of this the defendants pray judgment.

X.

Defendants specially except to the following language of subparagraph "(1)" of subdivision III of plaintiffs' petition, to wit: "Large amounts of money, and notes and accounts, bonds and loans, and bills receivable, were understood, agreed and permitted not to be taxed at all, and taxation thereof was purposely permitted to be avoided, except as to relatively small amounts," and say that said allegation is insufficient for that:

1st. The same is too indefinite and uncertain to notify defendants as to what facts plaintiffs will offer to prove thereunder, and what moneys, notes, accounts, bonds, loans, bills receivable, if any, were so permitted to escape taxation,—said allegation being too general to enable defendants to prepare their defense against the same,—and of this they pray judgment.

2nd. The plaintiffs should be required to file a bill of particulars in connection with such allegation so that defendants will be able to prepare their defense thereunto,—and of this they pray judgment.

3rd. Defendants further except to said portion of the petition upon the ground that if it be true that the scheme or system therein described existed in this county, that the same resulted to cause other taxable property in the county to be assessed at a valuation lower than its actual value, still plaintiffs would not be entitled to any relief by reason thereof until they had exhausted all of their legal remedies in the premises; and they had and have an adequate remedy at law, to wit: mandamus, to cause such other property to be properly assessed according to the constitution and laws of the State of Texas,—and of this they pray judgment.

XI.

For further answer, if the same should be required, defendants say:

(1) They deny all and singular the material allegations in plaintiffs' petition contained, and demand strict proof thereof.

(2) They especially deny the material allegations contained in Subdivision II of said petition.

(3) They especially deny the material allegations contained in subdivision III of said petition.

(4) They especially deny that the intangible values of the International & Great Northern Railway Company, as found by the State Tax Board, are in excess of the true value of its intangible assets, but, on the contrary, they say the real sum of the values of what is called the "physical properties" and of what is called "intangible assets" far exceed the sum of the total assessments of said properties, and that the real value of what is called the intangible assets far exceed the amount thereof found by the State Tax Board.

(5) They especially deny that there was any scheme or plan in existence in this county whereby "it was agreed and understood or permitted that the property taxable within the county should be assessed, valued, equalized and placed on the tax rolls for taxing purposes at not exceeding 38 per cent of its true value and of its true cash and market value, with the exception that the intangibles, if any, of railroads should be valued at their full value, as certified by the State Tax Board, and with the further exception that large amounts of money and notes and accounts, bonds and loans, and bills receivable, were understood, agreed and permitted not to be taxed at all, and the taxation thereof was purposely permitted to be avoided, except as to relatively small amounts, the system being to permit this class of capital to escape taxation, and with the further exception that the tangibles of this railroad taxable in this county were assessed and valued at a higher rate than the rate adopted for the valuation of the tangibles of other property taxable in this county; and that not less than 38 of the property in this county, subject to taxation, thereby escapes all taxation," as alleged in subparagraph "(1)" of subdivision III of plaintiffs' peti-

tion, and especially deny all material facts in said subdivision alleged, and say that, on the contrary that the property of the plaintiffs, including their intangible assets, were not assessed for taxation in greater proportion to their real values than other property in the county was assessed, and the intangible assets of the plaintiffs, considered alone, were not assessed at a great proportion of their real values than other property in the county, and therefore, that plaintiffs were not discriminated against as alleged by them.

Defendants say, in the alternative, that if it should be true that such a scheme and purpose did exist, the plaintiffs themselves were and are parties to it, helped to create it, and assisted in carrying it out for the purpose of securing a grossly inadequate valuation and assessment of their properties in said county, and thereby, or in some other manner, did secure a grossly inadequate valuation and assessment of their properties in the county and an assessment thereof at a value much less than the real value thereof, and an assessment thereof at a value much less than said 38 per cent of the real
41 value thereof and, that as a result of such conduct upon the part of plaintiffs said county and its taxing subdivisions, and the State of Texas have been or will be deprived of a great amount of revenue to which they are entitled from plaintiffs. And in this connection, defendants show unto the court the following:

1st. That by the laws of the State the plaintiffs were required to file a statement or list, under oath, of their properties in said county therein stating the "full and true value" thereof, the purpose of said statement being to assist the County Taxing Authorities in arriving at the correct assessment of such properties, and to furnish data therefor; the plaintiffs knew that the Taxing Authorities of said county were not in a position to know the "full and true value" of railroad property, and that they would be, and were, compelled to accept, or rely upon such statement, and they did, at least to a large extent, rely upon the truthfulness thereof.

2nd. That the plaintiffs did file such a statement under oath stating the value of such properties in such county to be, approximately, the sum of about $964,275 and such Taxing Authorities were compelled to, and did, rely at least to a large extent, upon the accuracy of such statement, and the contents thereof and the same resulted in the assessment of such properties in said county at $823,672 (about) which sum is much less than the "full and true value" thereof, and which is less than 38 per cent of the "full and true value" thereof.

3rd. That the plaintiffs well knew, or should have known, at the time that such statement was filed, and at the time that such assessment was made, that the statement of the value of such properties in such county was much less than the "full and true value" thereof, and was less than 38 per cent of the full and true value thereof, and that such statement was likely to and probably would, and did to a large extent, cause such properties to be assessed for taxation at an amount much less than the "full and true value" thereof.

42 4th. That therefore—

(a) The plaintiffs have not done, or offered to do, equity in the premises, and do not come into this court seeking equity with clean hands; and

(b) By reason of the premises, the plaintiffs are now estopped to plead the matters set forth in subdivision III of their petition or to secure any relief thereon.

Wherefore defendants pray that the plaintiffs be held estopped to plead the matters set forth in their said petition and to secure any relief therein, and that this cause be dismissed, and especially so as to the third subdivision of said petition.

The plaintiffs have in their possession a true and authentic copy of the list or statement referred to above, and they are hereby notified to produce the same upon the hearing hereof, and that evidence thereof will be offered by defendants.

(6) Defendants say that Section I of Article 8 of the Constitution of the State provides that "All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law."

That the Legislature of the State has enacted a system of laws for the ascertainment of this value of railroad properties, which system of law is in harmony with the laws providing for the ascertainment of the value of other properties. That such system of laws as to the ascertainment of the taxable values of railroad properties was rendered necessary, and is appropriate to the end, because the nature of this class of property is such that it is difficult for persons, who are not skilled in the management of railroads (and, generally speaking Taxing Officers are not so skilled) to ascertain the correct values thereof, and the system of laws with respect to the ascertainment of the taxable values of properties of this class are, therefore so framed as to leave it largely to those in charge of such properties to

43 fix the values, and to differentiate the various elements of the values thereof. And these laws especially, to a large extent, leave it to the managers of these properties to differentiate as between what proportions of the entire properties are to be classed as "tangibles" and what proportion thereof are to be classed as "intangibles."

The system of laws upon this subject operate, substantially, as follows:

By Article 7515, et seq., R. S. 1911, the managers of railroad properties are required, under oath, to list what they regard as their tangible properties at the "full and true value" thereof, in the various counties, except as to "Rolling Stock." Article 7525, R. S. 1911, requires them to make a sworn statement to the Tax Assessor of the county of its domicile showing the value of the rolling stock, etc. This value is equalized by the Equalization Board of the county and is then certified to the Comptroller, who, in turn, certifies it to the various counties into which the road runs according to mileage.

These sworn statements of value are required for the purpose of enabling the Taxing Authorities to know the proportion of the property to be classed and taxed as "tangibles" and defendants say that this classification should be held to be binding upon the plaintiffs in this respect.

Defendants say, furthermore, that whenever this classification has been made by the railroads themselves, it is appropriate for the remainder of their properties to be classified as "intangibles."

The total of the values of these tangible properties as made under the oath of the agents of plaintiffs in all of the counties into which the road runs approximates the sum of $14,926,122.10, for the year of 1915, whereas the total values of the properties of the plaintiffs for that year exceeded the sum of $40,000,000.00, while the total assessment of such properties tangible and intangible only approximate the sum of $24,086,719.

44 It became and was the duty of the plaintiffs to report, under oath, to the State Tax Board, the sum of its renditions in the various counties for that year; and this was done, and the Board had this information before — at the time of making the valuation of the intangibles herein complained of.

By Chapter 4, Title 125, R. S. 1911, it is made the duty of the State Tax Board to diligently inquire into all facts relative to railroad values so as to enable it to determine the true value of such properties, and, from all information which it is able to secure, the Board is charged with the duty of finding 1st. "the entire value of the property (of the Company, etc.)"; 2nd. "the true value of the tangible property"; and it is then required to subtract the latter amount from the former "and the residue and remainder of value shall be by said state tax board fixed, determined and declared as the true value of the intangible properties" (Article 7420). As aforesaid, the State Tax Board had the right to rely upon the sworn statements of the plaintiffs' agents stating the "full and true value" of the tangible properties, and the classification of their properties made thereby, and, if said sworn statements were untrue, and if error was made in the classification and in the amount of value of the tangible properties by reason thereof plaintiffs are now estopped to take advantage of the same, and for such relief defendants pray.

That as aforesaid the "entire value" of plaintiffs' properties are and were far in excess of the sum of $40,000,000.00 as will more specifically be alleged hereinafter. And defendants, therefore, say:

1st. That the entire properties of the plaintiffs in the State have been assessed for taxation, both upon the tangible and the intangible assets, at much less than 50% of their true values;

2nd. That their intangible properties have been assessed by the State Tax Board, and the various County Tax Assessors, at much less than 40% of their real values;

45 3rd. That the proportion of the sum of their intangible values properly belonging to this county has been assessed at

much less than or at least not exceeding, the proportion of value at which other property in the county has been assessed;

4th. That even if a mistake has been made in classifying plaintiffs' properties into "tangible" and "intangibles," and that a larger proportion of the entire values should be regarded as belonging to the "tangibles" still the true "intangibles" properly belonging to this county for taxation purposes have not been assessed at a greater proportion of their value than other property in the county.

5th. That if it be true, which is not admitted, but denied,—that the State Tax Board did not use logical formulas, or methods of calculation, and did not correctly understand the information in their possession and its application, nevertheless the results of their action and calculations are not erroneous and therefore their mistakes, if any, are immaterial and afford no basis for relief to the plaintiffs.

(8) As aforesaid, defendants say that the total value of all of the properties of the plaintiffs justly subject to taxation within the State exceeds the aggregated assessments thereof by the various county taxing authorities and the State Tax Board; and in this connection defendants show unto the court the following:

1st. The total valuation of tangibles and intangibles for taxation is the sum of $24,086,719.00.

2nd. The "Book Cost" of the properties of the plaintiffs up to June 30th, 1914, as shown by their records was the sum of $43,818,-430.79,—representing actual investments,—and since that time a large amount of money, the exact amount of which is to defendants unknown, has been invested therein—which records are in the possession of the plaintiffs, and they are hereby notified to produce the same upon the hearing hereof.

46 3rd. That during the year of 1911 the Railway Company—plaintiff—desired to issue bonds against its properties to the extent of $35,000,000.00, and in order to induce the Railroad Commission to permit the issuance of the same, represented the following as facts:

This amount was much less than the actual value of the road, "not including its good will;"

The actual cost of the road and equipment up to that time was $40,876,729.22, including, "betterments" prior to July 1, 1907, not including "the enhanced value of its lands and right of way and depot property of ever kind since same were purchased, in many instances more than thirty years ago, nor any donations or subsidies, and merely represents the actual expenditure of money in road and equipment;"

That the valuation of 772.3 miles of road as made by the Railroad Commission of Texas (included in the ultimate valuation of $34,-013,092.07) did not represent "the actual value of the property, nor did it represent—the actual cost of the property up to that time. This 772.3 miles of road has been greatly increased in value by per-

manent betterments, additions and improvements, besides its original right-of-way, depot grounds, and other landed properties have greatly increased in value approximately 33⅓ per cent. Taking the Commission's own valuation, which — much less than the actual value of the property, and adding thereto additions, betterments and permanent improvements since that time, it shows this property to be worth, upon this basis alone, the sum of $32,702,972.38. And should the Commission add to this value for franchise, 10% it would give a valuation exceeding $35,000,000.00;

"All of the terminal properties of this road have greatly enhanced in value, even within the last ten years; the Magnolia Park Railroad, which was purchased a few years ago at Houston, has greatly increased in value, and is worth, approximately, a million dollars more than at the time it was purchased;

47 "The Company owns and possesses a forty-year contract for trackage rights over the G. H. & R. R. between Houston and Galveston, and the use of the terminals of that company both in Houston and Galveston; this trackage right is a very valuable asset, and the same has never been taken into consideration or considered a part of the property of this road for the purpose of issuing stock and bonds. At the very lowest figure this trackage right is worth, approximately, one million dollars; if these values are added to the Commission's old valuations, plus betterments, improvements and additions, it would make, even upon this basis, a value in excess of $35,000,000.00";

"The amount asked for in this instance ($35,000,000.00) is far less than the actual value of the property as it exists by several million dollars";

"The International & Great Northern Railroad goes through the best part of Texas, its business will increase from year to year; it has an established good will";

"In the valuation made in 1895, (included in the present valuation), the right-of-way was estimated as being 50 feet from the center of track, when as a matter of fact 242.20 miles was 100 feet from center and 124.52 miles was 75 feet from center. The valuation as fixed by the Commission, therefore, did not include approximately 3,648 acres. If this acreage had been included by the Commission, and using the Commission's basis of value at that time, it would have increased the value of the right-of-way approximately $100,000.00";

"The stations and depot grounds, in the valuation of 1899, were estimated at a figure very much less than their value, even at that time, and the value of these properties has increased, approximately, more than 100 per cent;"

"The value of equipment, as made by the Railroad Commission was less than cost or value by the sum of $743,855.00;

48 "The seasoned condition of the International & Great Northern Railroad has not been taken into consideration in arriving at the value of the same by the Commission; this element of seasoning is a commercial factor, and should be taken into consideration in arriving at the true value of a railroad; there is a differ-

ence of opinion among engineers as to what the element of value of seasoning is worth, the testimony ranging form $1,000.00 to $5,000.00 a mile; but taking the lowest basis of $1,000.00 a mile, this would increase the value of the I. & G. N. over the estimate heretofore made by the Commission, more than a million dollars."

"If these additional factors of value are taken into consideration, it would bring the value of the I. & G. N. property up to an amount exceeding $36,000,000.00, even though we use the Commission's former basis of valuation, plus betterments, plus improvements and plus an arbitrary for franchise; and using the value of original cost of road and equipment, and additions, betterments and improvements placed thereon, the property of the International & Great Northern Railroad is worth in excess of $40,000,000.00";

The above facts are shown by two certain letters written by Thomas J. Freeman, Receiver and General Manager of the plaintiff company to the Railroad Commission of Texas, on May 5th and June 7th, 1911, respectively, now on file in the office of the Railroad Commission of Texas, and certified copies thereof are hereto attached and marked Exhibit — and Exhibit —. Authentic copies thereof are in the possession of the plaintiffs and they are hereby notified to produce the same upon hearing hereof.

(5) Defendants say that the complainants and their properties as a whole, are possessed of other large elements of value that have never been rendered or assessed for taxation, other than as they may appear in the final valuations made by the State Tax Board, and which properly belong in such final valuations, and among other such things they show unto the Court the following:

49 (*a*) The Railway Company has a contract, covering a long term of years, with the Wells Fargo Express Company, which Express Company does the express business upon and a long said railroad under the terms of which contract the Express Company, from time to time, pays to the complainants fifty per centum of its total gross earnings, with a fixed minimum annual payment of $165,614.00. As illustrative of the value of this contract to complainants, defendants show unto the court that the total gross receipts of said Express Company, on said lines for the year ending June 30th, 1914, was the sum of $382,912.09. Or taking said minimum annual payment and capitalizing the same at the rate of 7% will show the sum of $2,365,914.20 as the value of said contract.

(*b*) The railway company has a contract with the United States Government, Post Office Department, for the carriage of the mails over its lines, which contract, or renewals thereof, is practically perpetual, and which contract is a valuable one to complainants and a profitable source of revenue, paying the complainants at the rate of about $246,373.74 per annum. The value of this contract properly belongs in the final valuation made by the State Tax Board.

(*c*) The complainants have valuable contracts with the Pullman Company and the American Refrigerator Transit Company, under

which they secure for the use of their business the use of valuable equipment, thus saving otherwise necessary investment of large sums of money in equipment, etc. the defendants cannot now allege the value of said contracts to complainants but they allege that the value thereof amounts to many thousands of dollars, and the same should be taken into consideration in testing the correctness of the final valuation made by the State Tax Board.

(*d*) A description of the aforementioned contracts is shown on pages — of Exhibit No. 1, filed herewith and made a part hereof.

50 (*e*) In addition to the foregoing values, or elements thereof, the Railway Company then and now owns a forty-year contract for trackage rights over the lines of the Galveston, Houston & Henderson Railway Company, between the cities of Houston and Galveston, through the counties of Harris and Galveston, and the use of the terminals of that company both in Houston and Galveston. This right, or property, although very valuable, is not rendered for taxation in any county, and its value, because of the nature of the right, does not attach to the purely physical property of complainants in said two counties, but extends and attaches to the entire property throughout the State; this is true because under the contract and right the complainants have acquired, and own, facilities enabling them to handle the vast traffic gathered along their entire route and to concentrate the same at Houston and Galveston and to secure vast amounts of traffic at Houston and Galveston to be distributed along the entire routes of themselves and their connecting carriers in the interior of Texas and other States; the value of the most remote mile of their tract is enhanced in value by the possession of this property-right in Houston and Galveston. As stated before, this element of property has never been rendered or assessed for taxation, except as it may be included in the valuations made by the State Tax Board. In said report to the State Tax Board, the complainants represented that they owned 62 1/10 miles of track in Harris county, of the real value of $1,360,-393.98, or the average value of $26,737.00 per mile. They also reported that the assessment value of the rolling stock apportioned to Harris County was $105,108.00; making a total valuation in Harris county of $1,765,501.98; for the year 1915, complainants rendered no real estate in Galveston county and the total rendition in that county, was the sum of $500.00 "for office furniture" as is shown by Exhibit No. 3, filed herewith — manifestly there is no method whereby the exact value of this element of property
51 can be exactly ascertained, but the complainants regard it as worth a great deal of money, at least for bonding and rate-making purposes; and in this connection defendants show unto the court that during the year 1911 the complainant company claimed that said right, said property, was worth more than $1,000,-000.00, and held out this minimum estimate of value as an inducement to secure the privilege of issuing bonds against it,—as is shown

by Exhibit No. 2 filed herewith and made a part hereof; and defendants, upon information and belief, here allege that such right, or property is worth more t an $1,000,000.00.

(*f*) Independent of the property and otherwise mentioned, the complai its own other valuable terminal properties, rights and privileges in Harris county, the value of which, because of their location and because they are parts of the entire enterprise, and furnish facilities for the handling of the traffic collected or distributed along the entire route, far exceed the value of the purely physical property involved. Included in the valuations rendered in Harris county, mentioned in paragraph Vi-(2) above, were included the purely physical properties of what is known to Complainants as the "Magnolia Park Railroad," which properties were purchased by the Railway Company many years ago and combined with its other properties into the "system;" by reason of the location of this property and because it is a unit in the entire enterprise, and for other reasons, the value of this property has greatly enhanced during the last 15 years, and up to the year of 1911, according to the estimate of the railway company for bonding purposes, it had increased more than $1,000,000.00 over the cost price thereof, as is shown by Exhibit 2, filed herewith as a part hereof. The value of this terminal property, beyond its purely physical value, and as a part of the going concern, has never been rendered or assessed for taxation except as the same may be included in the valuations made by the State Tax Board, and defendants here allege, upon information and belief, that the value of such element of property, properly belonging in the valuation
52 of the State Tax Board, and over the valuation assessed in Harris county exceeds the sum of $1,500,000.00.

(*g*) Defendants, upon information and belief, show to the court that, independent of the terminal properties and rights mentioned above, the complainants own valuable terminal and trackage properties and rights at other places in the State—amongst other places, Waco, Ft. Worth, Palestine, Tyler, Longview and Mineola,—and that because these properties and rights are related units of the entire system of the complainants and their connecting carriers and afford facilities for the gathering, handling and distribution of the traffic gathered and handled over such systems, and for other reasons they have a value that does not attach entirely to the purely physical properties in said places and which exceeds the value of the purely physical properties, and their values as assessed in such counties, by a vast amount, the amount of which, manifestly, cannot be accurately estimated, but which, defendants allege, exceed $1,500,000.00 which excess of valuation propery belongs in the final valuation made by the State Tax Board.

(*h*) Defendants allege, upon information and belief, that the complainants own a valuable contract, for a long term of years made with the M. K. & T. Ry. Co. of Texas, whereby the M. K. & T. Ry. Co. of Texas has acquired, and now owns, the right to run its trains over the tracks of the complaimnts between the cities of Austin and San

Marcos—which right, to the M. K. & T. Ry. Co. of Texas, however, does not include the right to take traffic at the stations between said cities,—which contract and property pays the complainants the sum of $43,811.19 per year and other valuable considerations, and which element of property has never been rendered or assessed for taxation, and will not be, except as the same may be included in the final valuations made by the State Tax Board; defendants cannot exactly estimate the value of this property and right to the complainants, but say that the same exceeds the sum of $500,000.00.

(*i*) The values of the road-bed, track, etc. of the complain-
53 ants when considered as an entire system, and not as units segr-ated by county lines, are enhanced from year to year by what is called "seasoning," which element is a commercial factor, belonging to the entire properties, and not considered in making renditions and assessments in the various counties. This element of value is of gradual growth, increasing with the passing of years and the use of the properties; this element of value, properly belonging in the final valuations made by the State Tax Board, is impossible of exact measurement, but the estimates thereof made by competent engineers range from $1,000.00 per mile of road to about $5,000.00 per mile, and defendants allege that it equals at least the sum of $1,000.00 per mile of road owned by the complainants, or the total sum of $1,106,000.00.

(*j*) The properties and business of the complainants, considered as a whole, have an element of value, known as "Good Will," which does not belong to the various unites of their purely physical properties as segregated by county lines, and which properly belongs in the final valuations made by the State Tax Board; the complainants regard this element as of great value, and have held the same out as real values for bond issuing, and rate-making purposes, as is shown by Exhibit No. 2, filed herewith as a part hereof. Defendants say, as is manifest, that the value of this element of property cannot be accurately measured but that it is real and should be considered in determining the correctness of the final valuations made by them.

(*k*) Defendants say that complainants, and their properties, have a value, in addition to the rendered or assessed values in the various counties, which value belongs to the properties and business as a whole, and which, patently, cannot be segregated by county lines, by reason of the possession and user by them of valuable franchises, conferring upon them special privileges and great and unusual powers, which value properly belongs in the final valuations by the State Tax Board; defendants say that this element of value is incapable of exact measurement, but that it is real and of great proportions; that it is estimated by the Railroad Commission, in the valuation of
54 properties at from 6% to 10% of the total valuation of the purely physical properties, and this estimate is equalled or exceeded by complainants themselves, and others in the same line of business, in ascertaining the true total value of the railroad as a whole and as a going enterprise, and defendants say that a minimum valu-

ation of 10% of the total value of the entire physical properties is a just and proper valuation of this element of property.

(*l*) The complainants, and their properties considered as a whole have a taxable value independent of and in addition to the value of the purely physical properties, which valuation escapes taxation except as the same may be included in the final valuations found by the State Tax Board, and which properly belong in such final valuation, because of the right to pursue the occupation of owning and operating a railroad in the State. As is manifest, this element of value is incapable of exact ascertainment, but defendants show unto the court, that the Legislature of Texas in 1905, enacted a law levying an occupation tax upon Railway Companies equal to 1% of the total gross receipts, per annum; the average total gross receipts of complainants for the years 1911, 1912, 1913 and 1914 was the sum of $10,396,079.00 and upon this average sum the complainants would have had to pay the sum of $103,960.79 per annum, but said tax has been commuted in favor of complainants, and others of the class, with the intention upon the part of the legislature, that the occupation should be included in the final valuation of the State Tax Board and that such valuation, among other things, should result to produce the amount that would otherwise have been due as an occupation tax *eo nomine*. The State Tax rate (ad valorem) for the year of 1914 was 37½ cents per $100.00 of value and the capitalization of the aforesaid average payment upon the occupation at the rate would show the sum of $27,722,666.66 as the valuation of the occupation for taxing purposes.

If it be considered that the occupation tax, if collected, should include the proper tax payment by all the elements of the property otherwise escaping, or the tax payment upon the values represented by the "intangibles" as found by the State Tax Board, it will be seen from the above that the value of the occupation far exceeds the final valuation as made by the State Tax Board.

55

Or if it be considered that the amount of the gross receipts, under the occupation tax law, is the subject of taxation it will be seen that the taxable value under the occupation tax law and the taxable value found by the final estimate the State Tax Board, as "intangibles" are approximately equal, so far as tax payments are concerned,—the average gross receipts for the four years of 1911, 1912, 1913 and 1914 being the sum of $10,396,079.00 and the taxable valuation found by the Board being $10,743,223.00.

Defendants say that the contracts, and other documents, referred to in this subparagraph are in the possession of the plaintiffs and they are hereby notified to produce the same upon the hearing hereof.

5th. Defendants show unto the court that in addition to the stocks and bonds reported to the State Tax Board, etc., and in addition to the total capitalization of the complainants as so shown, the complainant Railway Company heretofore, on or about the 29th day of December, 1911, issued and now has outstanding, "special stock" or a pecuniary obligation evidencing a valuation in excess

of its stated capital stock and bonds, of the face value of $5,078,000.00, which "special stock" and obligation reads, as follows, to-wit:

"International and Great Northern Railway Company."

No. 2. 50,780 shares.

Incorporated under the Laws of the State of Texas.

Conditional Interim Certificate.

"This certifies that the International and Great Northern Corporation is entitled to receive, if, as and when the same is authorized by law to be issued and is issued, but not before, fifty thousand, seven hundred and eighty shares of the common stock of the company out of the amount of said common stock authorized
56 by the Articles of Incorporation of the Company but unissued at the date of this certificate.

Until the redemption of this certificate, as hereinafter provided, the holder thereof is entitled to receive, from time to time, as and when dividends are declared and paid upon the common stock of the company then outstanding, sums of money by way of interest upon the par amount of the common stock expressed upon the face of this certificate, at the same rate as the rate of dividends so declared and paid upon the outstanding common stock of the company.

This certificate is transferable, in person or by attorney on books kept by the company for that purpose, upon surrender of this certificate properly endorsed. The holder of this certificate is not entitled to vote at any regular or special meeting of stockholders, nor to exercise any other rights of stockholders of the company. This certificate is one of a series of certificates authorized by unanimous action of the entire Board of Directors and of all the stockholders of the Company at meetings duly held, and is issued under an agreement, dated November 7, 1911, executed by International and Great Northern Railway Company to which agreement all holders of certificates of this issue, by the acceptance thereof, becomes parties. All or any part of the certificates of this issue may be redeemed by the company, in the manner and upon the terms set forth in the above mentioned agreement, by the issue and delivery to the registered owners of the certificates so redeemed of a par amount of common stock of the company equal to the amount of said common stock expressed upon the face of the certificate so redeemed.

In Witness whereof, International and Great Northern Railway Company has caused this certificate to be signed by its President, or one of its Vice-presidents, and its corporate seal to be hereto affixed, attested by its Secretary or one of its Assistant Secretaries, this 29th day of December, 1911.

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY,
By THOMAS J. FREEMAN,
President.

Attest:
A. R. HOWARD,
Secretary."

57 Defendants say that the issuance and outstanding of the aforesaid instrument evidences opinion in the minds of complainants and those who hold said certificate, that the entire properties of complainants have a real value over and above the total capitalization thereof as reported to the State Tax Board of at least the face value of said certificate, and defendants say, that said certificate should be taken into consideration in determining the correctness of the final valuation made by the State Tax Board.

Said "Interim Certificate," or authentic copies thereof, are in the possession of the plaintiffs and they are hereby notified to produce the same upon hearing hereof.

6th. The plaintiffs are hereby notified to produce upon hearing hereof their "Comparative General Balance Sheets" or copies thereof for the years ending June 30th, 1914, and June 30th, 1915.

7th. Defendants say that the aforesaid facts were available to the State Tax Board, that the same were made public records by the plaintiffs and that therefore:

(*a*) The State Tax Board had a right to rely upon the information therein contained; such facts show that the assessment of the intangibles, and other properties of the plaintiffs, is in no sense excessive, either as a whole or as to the portion thereof properly belonging to this county for taxation purposes; and that plaintiffs are now estopped to deny the same, or to take advantage of any errors that may have been caused by the publication of such fact, if any such errors exist, which is not admitted but denied.

(*b*) If it should appear that the Tax Board did not avail itself of such information, and did not, rely thereon, nevertheless such facts show that the properties of the plaintiffs have not been excessively assessed, either absolutely or as compared with other property in this county.

(9) Defendants show unto the court that the final valuation of the "intangible properties" of the complainant company for each of the years of 1907 to 1915, inclusive, as made by the State
58 Tax Board, was as follows, 1907, $15,921,423; 1908, $14,455,420; 1909, $14,488,600; 1910, $14,428,600; 1911, $14,488,600; 1912, $14,483,800; 1913, $14,488,600; 1914, $14,488,600; 1915, $10,743,223. The valuation for 1915, being a reduction from the valuation of 1914 of $3,745,377.

(10) Defendants here adopt the allegations contained in subdivisions I and II hereof and make the same a part of their answer, and pray that the plaintiffs be held barred and estopped to further plead said issues of fact and of law or to recover thereon.

(11) Wherefore, having fully answered herein, defendants pray that they go hence without day or damage, and that they have judgment against the plaintiffs for all costs of suit and for such other relief, both general and special, to which they may be entitled.

SEWALL MYER,
County Attorney, Harris County, Texas,
B. F. LOONEY,
Attorney General,
LUTHER NICKELS,
Assistant Attorney General,
Attorneys for Defendants.

"EXHIBIT 1."

International & Great Northern Railroad Company, Thomas J. Freeman, Receiver and General Manager.

Houston, Texas, May 5, 1911.

To the Railroad Commission of Texas, Hon. Allison Mayfield, Chairman, Austin, Texas.

GENTLEMEN:

On the 16th of this month the International & Great Northern Railroad will be sold out under foreclosure proceedings and will be bought in by certain individuals who desire to reorganize the road, and for the purpose of properly perfecting said reorganization it will become necessary to issue both new bonds and stock. It is very desirable that the Commission fix the amount of stock and bonds that may be issued against the property prior to the
59 sale, as the amount so fixed by the Commission will remove any doubt as to the question of securities to be issued hereafter.

The purchasers at said sale will reorganize the property under the existing Texas laws. The amount of stock and bonds desired to be issued on the property is $35,000,000.00 which is at the rate of $31,645.00 per mile of road owned, and at the rate of $30,185.00 per mile of road owned and operated. This amount, I respectfully state, is much less than the actual value of the road, not including its good will. The actual cost of road and equipment of the International & Great Northern Railroad Co. amounts at this time to the sum of $40,876,729.22. This does not include any betterments prior to July 1, 1907, and this value does not include the enhanced value of its terminals, or the enhanced value of its lands and right-of-way and depot property of every kind since same were purchased, in many instances more than thirty years ago, nor any donations or subsidies and merely represents the actual expenditure of money in road and equipment. This Commission, in about January, 1895, had a physical valuation made of the International & Great Northern Railroad, at that time consisting of 772.3 miles. At the time said

valuation was made, every item and element entering into the valu
of railroad property was at a very low figure, and the amount of th
valuation found at that time by the Railroad Commission did no
fairly and justly represent the actual value of the property, nor di
it represent fairly and justly the actual cost of the property up t
that time. This 772.3 miles of road had been greatly increased i
value by permanent betterments, additions and improvements be
sides its original right-of-way, depot grounds and other landed prop
erty have greatly increased in value, approximately at least 33-1/
per cent. The Ft. Worth Division of the road, consisting of 323.
miles, has never been finally appraised by your Honorable body fo
stock and bond purposes, but was only partially appraised, a
60 it was not necessary to have a final appraisement in order t
issue the bonds that were issued on that division of the road
I would respectfully state that, taking the Commission's own valua
tion, which was much less than the actual value of the property, an
adding thereto additions, betterments and permanent improvement
since that time, it shows said property to be worth, upon this basi
alone, the sum of $32,702,972.38. And should this Commissio
add, even to this value 10 per cent for franchise, it would give
valuation exceeding $35,000,000.00.

I would further beg to state that all of the terminal properties o
this road have greatly enhanced in value, even within the last te
years; that the Magnolia Park Railroad, which was purchased a fe
years ago at Houston, has greatly increased in value, and is worth
approximately, a million dollars more than at the time its was pur
chased.

I would further state that this company owns and possesses
forth years contract for trackage rights over the G. H. & H. R. R
between Houston and Galveston, and the use of the terminals of tha
company both in Houston and Galveston; that this trackage right i
a very valuable asset, and same has never been taken into considera
tion or considered a part of the property of this road for the purpos
of issuing stock and bonds. At the very lowest figure this trackag
right is worth, approximately, one million dollars; that if these ad
ditional values are added to the Commission's old valuation, plu
betterments, improvements and additions, it would make, even upo
this basis, a value in excess of $35,000,000.00.

I would further state that the property of this road has been ap
praised by the Intangible Tax Board for a period of years in excess o
$35,000,000.00 to-wit: In 1907 it was appraised by the State In
tangible Tax Board at $36,908,422.00; in 1908, $35,663,779.00; in
1909, $35,795,416.00; in 1910, $35,795,416.00; and notice
61 has just been received from said Tax Board who in their pre
liminary finding find the road to be worth $36,076,982.00.

I would state that the facts as herein recited are nearly all matter
of record in the Commission's office, or shown by the records of thi
road, which are subject to the inspection of your honorable body in
order to verify these facts. I attach hereto certain statements in
which these facts are set out in more minute detail.

I would further state to the Commission that the plan of reor

ganization, as outlined up to the present time, is a very valuable one, and it is to the interest of the property and the owners of same that said reorganization be perfected at this time; that with a capitalization of $35,000,000.00, the fixed charges of the new company will be much less than heretofore, and its capitalization, including cost of road and equipment and liabilities will be approximately reduced to the extent of at least $11,000,000.00; that all of the indebtedness required under the law of Texas to be paid by the company reorganizing, will be paid when the company is reorganized.

I would further state that under the facts set forth herein, which are matters of record, or subject to quick investigation and ascertainment, there will be no necessity, in my opinion, for a physical revaluation of the property, but that the amount asked for is ascertainable without a physical revaluation and the amount asked for is far less than the actual value of the property; that the purpose of the stock and bond law was to enable the Commission to certify that property to the full value of the stock and bonds authorized to be issued, actually existed. The amount asked for in this instance is far less than the actual value of the property as it exists, by several millions of dollars. The International & Great Northern Railroad goes through the best part of Texas; its business will increase from year to year; it has an established good will, and with the amount of its capitalization reduced to $35,000,000.00, it carries with it the positive assurance that its fixed interest charge will be cared for.

62 I would further state that the plan of reorganization of the new company call for an improvement fund of $3,000,000.00 the expenditure of which amount will place the property in a fine physical condition, and greatly reduce its operating expenses, giving a further assurance of its ability to meet all of its obligations in the future.

For the reasons specified I respectfully ask this Commission to appraise the property of the International & Great Northern Railroad as it now exists, for the purpose of a new issue of stock and bonds by a reorganized company, at and for the sum of thirty-five million dollars, the stock and bonds to be divided as the owners of the reorganized property may elect.

Respectfully submitted,

THOMAS J. FREEMAN,
Receiver.

(Copy.)

STATE OF TEXAS,
County of Travis, ss:

I, E. R. McLean, Secretary of the Railroad Commission of Texas, do hereby certify that the above and foregoing is a true and correct copy of a letter received from Honorable Thomas J. Freeman, Receiver and General Manager of the International and Great Northern Railroad Company, and now on file in the office of the Railroad Commission of Texas, in the Capitol, in Austin, Travis county, Texas.

In testimony whereof, Witness my official hand and seal of the Railroad Commission of Texas, on this the 12th day of July, A. D. 1915.

(Signed) E. R. McLEAN,
Secretary, Railroad Commission of Texas.

"EXHIBIT 2."

International & Great Northern Railroad Company.

Thomas J. Freeman, Receiver and General Manager.

Houston, Texas, June 7, 1911.

To the Honorable Railroad Commission of Texas,
Hon. Allison Mayfield, Chairman,
Austin, Texas.

GENTLEMEN:

63 Supplementary — my letter of May 5, 1911, in the matter of valuation to be placed upon the properties of the International & Great Northern Railroad. I beg to call your attention to the additional fact that in the valuation made of the old line in 1895, the right-of-way was estimated as being 50 feet from center of track, when as a matter of fact 242.20 miles was 100 feet from center, and 124.52 miles was 75 feet from center. The valuation as fixed by the Commission, therefore, did not include approximately 3,648 acres. If this acreage had been included by the Commission, and using the Commission's basis of value at that time, it would have increased the value of the right-of-way approximately $100,000.00.

I again call attention to the fact that the right-of-way depot grounds and other physical properties of the railroad were estimated at a very low figure in 1894, and the increased value of these properties has never been taken into consideration by the Commission. I especially direct the Commission's attention to the fact that the stations and depot grounds, in the valuation of 1894, were estimated at a figure very much less than their value, even at that time, and that the value of these properties has increased, approximately, more than 100 per cent.

I would further direct your attention to the fact that in your valuation of the main line property in 1895, the equipment, to-wit: locomotives, passenger cars, freight cars and other cars, was largely undervalued; that the original cost of locomotives valued by the commission at that time was $1,057,575.00, while the Commission's value was only $556,700.00. The original cost of passenger cars valued by the Commission, as shown by the records of this road was $286,200.00, and the Commission's value was only $216,900.00. The value of the freight cars, as shown by our records was $912,200.00, and the Commission's value was $754,810.00. Other cars as shown by our records $55,900.00; the Commission's value $40,550.00;

Total original cost as shown by our records, is $2,312,815.00; value as shown by the Commission's valuation of 1895, $1,568,-
64 960.00, a difference of $743,855.00.

I direct the Commission's attention to the fact that the original cost value of this equipment should have been used as the basis of value by the Commission.

I further direct the Commission's attention to the fact that the seasoned condition of the International & Great Northern Railroad has not been taken into consideration in arriving at the value of same by the Commission; that this element of seasoning is a commercial factor, and should be taken into consideration in arriving at the true value of a railroad; that there is a difference of opinion among engineers as to what the element of value of seasoning is worth, the testimony ranging from $1,000.00 to $5,000.00 a mile; but taking the lowest basis of $1,000.00 a mile, this would increase the value of the I. & G. N. over the estimate made by the Commission heretofore, more than a million dollars. If these additional factors of value are taken into consideration, it would bring the value of the I. & G. N. property up to an amount exceeding $36,000,000.00, even though we use the Commission's former basis of valuation, plus betterments, plus improvements and plus an arbitrary for franchise; and I would again state that, using the value of original cost of road and equipment, and additions, betterments and improvements placed thereon, that the property of the International & Great Northern Railroad is worth in excess of $40,000,000.00.

Respectfully submitted in connection with my former letter on the same subject matter.

Yours very truly,

THOMAS J. FREEMAN.

(Copy.)

STATE OF TEXAS,
County of Travis, ss:

I, E. R. McLean, Secretary of the Railroad Commission of Texas, do hereby certify that the above and foregoing is a true and correct copy of a letter received from Honorable Thomas J. Freeman, Receiver and General Manager of the International and Great
65 Northern Railroad Company, and now on file in the office of the Railroad Commission of Texas, in the Capitol, in Austin, Travis county, Texas.

In Testimony whereof, witness my official hand and the seal of the Railroad Commission of Texas, on this the 12th day of July, A. D. 1915.

(Signed) W. R. McLEAN,
Secretary Railroad Commission of Texas.

Filed March 6th, 1916.
O. M. DUCLOS,
Clerk District Court, Harris Co., Texas,
By B. J. WITT,
Deputy.

4—488

Plaintiffs' First Supplemental Petition.

Filed Mch. 6th, 1916.

In the District Court of Harris County, Texas.

No. 68800.

JAMES A. BAKER and CECIL A. LYON, Receivers, et al.

vs.

KARL L. DRUESEDOW et al.

Supplemental Petition in Answer to Defendants' Plea in Abatement and Original Answer Filed Feby. 8th, 1916.

I.

In reply to Section I of the answer:

(1) The plaintiffs demur to Roman Section I of the answer setting up a claim of res adjudicata and judicial estoppel, because the same is insufficient in law.

(2) The plaintiffs deny all of the allegations in said section contained.

(3) Specially pleading, if special plea be required, the plaintiffs represent as follows:

In said plea no complete account is given of the hearing in the Federal Court or of what was done there, nor of the pleadings in that case.

The plaintiffs filed a bill in the Federal Court as ancillary to Equity No. 49. They filed the bill with the permission of the Federal Judge, it resting with him to permit or not to permit the filing of such ancillary bill. This bill was ancillary to Equity
66 No. 49, styled Central Trust Company of New York vs. International & Great Northern Railway Company, in which Receivers had been appointed. Having procured a stay order which would expire unless a temporary injunction was granted as provided by the rules of that court, the case was set down for hearing in chambers under the rules of the court to determine whether or not a temporary injunction should be granted and nothing else, and not for a hearing upon the disposition of the case. At that hearing what was done is not fully stated by the defendants, but on the contrary the most material matters are omitted. On July 20, 1915, at this hearing to determine whether an interlocutory should be issued, the Federal Judge before he made the order relied on by the defendants and set out by them, made the following order, entered in Equity Journal Vol. 6, page 299 of that court;

"On this day again came the parties to this cause, and all parties announcing ready, thereupon the hearing was resumed before the Court. And the court having heard the pleadings and the evidence in support thereof, is of the opinion that the order permitting the complainants to file their ancillary bill in this cause was improvidently entered, and the same is hereby withdrawn.

"It is further ordered that the Complainants' application to amend their bill, this day presented in open court, after the conclusion of the evidence be and the same is hereby denied."

Whereby by the order of the court the Receivers, plaintiffs in this case, were withdrawn from the further litigation, the court thereby directing that they were not authorized to litigate in the ancillary suit; whereby it is submitted that as to them the case was dismissed, no ruling being made as to whether or not upon the merits of the case they were entitled to a temporary injunction or any relief. The court then entered the order plead by the defendants herein, but the case remained upon the docket being in the breast of the court whereby he could modify or change any order made by him,
67 until the regular term on November 3, 1915, when the following order was made, entered in Equity Journal 7, page 185;

"On motion of complainants it is ordered and decreed that the above styled case be dismissed without prejudice to the litigation by complainants of the matters therein involved."

It was contended by the defendants at the hearing upon application for an interlocutory injunction that the court was without jurisdiction in the ancillary case to entertain such hearing, at least as to the Receivers, and it is submitted also that it was generally contended that the court was without jurisdiction, and various contentions were made. The complainants in that case did not ask for a final disposition of the case or for a final decree, but only for a temporary injunction, and no hearing was held with a view to a final decree.

The plaintiffs demand the production by the defendants of all of the pleadings and proceedings at the hearing in the Federal Court, and submit that there was no final adjudication of the matters herein involved sought or attempted at such hearing, and that such orders as therein were made were interlocutory and not final, and that no issue herein has become res adjudicata by reason of such proceedings, and all this the plaintiffs are ready to verify.

WILSON, DABNEY & KING,
Attorneys for Plaintiffs.

I, Sam'l B. Dabney, being duly sworn do on my oath say that the matters set forth in Arabic Section 3 above are true.

SAM'L B. DABNEY.

Sworn to and subscribed before me by Sam'l B. Dabney, this the 10th day of February, 1916.

[SEAL.]

L. TEMME,
Notary Public in and for Harris County, Texas.

(4) Wherefore, upon all of the above the plaintiffs pray that Roman Section I of the answer be held for naught and be struck out.

68

II.

As to Roman Section II in said answer, the plaintiffs reply thereto as follows:

(1) They demur to the same and say that it is insufficient in law.

(2) They deny all of the allegations in said section contained.

(3) The plaintiffs repeat all of their allegations under their sworn pleading, Arabic Section 3 above under Roman Section I; and make them their plea in answer to Roman Section II of the answer, if any reply thereto be needed.

(4) Wherefore, the plaintiffs pray that Roman Section II of the answer be held for naught and be struck out, making this prayer upon all of their above defenses and their demurrer.

III.

As to all the matters alleged in Roman Section XI of the answer, the plaintiffs make reply thereto as follows:

(1) They demur to the same and say that they are insufficient in law.

(2) They deny all of such allegations.

(3) Wherefore, upon all of the above the plaintiffs pray that none of the defendants' answer be sustained, and that they have a decree and all of the relief as prayed for in their original petition.

WILSON, DABNEY & KING,
Attorneys for Jas. A. Baker & Cecil Lyon, Receivers of the I. & G. N. Ry. Co., and for the International & Great Northern Railway Co., Plaintiffs.

Filed Mch. 6th, 1916.
O. M. DUCLOS,
Clk. D. C. H. C.,
By B. J. WITT,
Deputy.

69 *Def'ts' Supplemental Plea in Bar & Supplemental Answer.*

Filed Mch. 6th, 1916.

In the District Court of Harris County, Texas.

No. 68800.

JAMES A. BAKER, Receiver, et als.

vs.

KARL DRUESEDOW, Tax Collector; W. H. WARD, County Judge; W. H. Lloyd, County Commissioner; W. H. Kiser, County Commissioner; J. A. Smith, County Commissioner; D. Barker, County Commissioner, All of Harris County, Texas.

To said honorable court:

Come now the defendants in the above styled and numbered cause and file their supplemental plea in bar, in reply to plaintiffs' supplemental petition in answer to defendants' plea in abatement and original answer," filed herein on the — day of February, 1916, and for supplemental plea and reply say:

1. Replying to the matter set out in numbered paragraph (3) of subdivision I of plaintiffs' said supplemental petition, they say: That the cause was not set down for hearing in Chambers, and that the same was not heard in Chambers, but the same was heard in open court, and all proceedings thereon were had in open court; said hearing was not held for the purpose, alone, of determining whether or not a temporary injunction should issue, but the same was held for the purpose, and resulted in a hearing to, determine the merits of the controversy, and the same did finally determine such merits. In this connection defendants show unto the court the following:

(a) That the defendants in said Equity Cause No. 65, were entitled to a speedy determination of the controversy, and had the right, under the law, the rules of said Court, and under the practice therein, to bring the matters there involved to issue at once, and this they did in the following manner:

They filed in said cause a motion to dismiss said cause, upon the merits, for want of equity, and for other reasons, as will appear from said motion, a true copy of which will be offered in evidence upon the hearing hereof; that said motion to dismiss was duly presented to said court, in open court, on the 15th day of July, 1915,
70 and the defendants therein announced ready for trial thereon, and said motion being fully argued by counsel for all parties, was taken under consideration by the court, to be determined by him during said proceedings.

They also filed on said date in said cause their answer to the merits, traversing all allegations made by the complainants and pleading affirmative matters, as will appear from said answer, a true copy of which will be offered in evidence upon the hearing hereof,—and announced ready thereon. Said answer and announcement had the effect to put all matters in controversy at issue, under the law, and the rules and practice of said Court. Complainants presented their bill of complaint. And said Pleadings all being before the court, the court proceeded to hear the evidence, and continued to hear the evidence until late in the afternoon of July 19th, 1915. This evidence was of sufficient volume to cover more than 260 pages of legal cap paper and the Stenographer's Transcript thereof will be exhibited upon the hearing hereof.

During said hearing, and on the 19th day of July, 1915, complainants were allowed to and did file their supplemental bill of complaint and also their amendment to the original bill, and on the 20th day of July, 1915, before entry of the judgment, they offered to file another amendment leave to file which was denied by the court because the presentation thereof was negligently delayed, as defendants now aver, although the order thereon recites that such refusal was based upon the ground that the evidence had been closed,—and true copies of such instruments will be exhibited upon the hearing hereof. Defendants aver that the presentation of such instruments by complainants show, and had the effect to show, that complainants recognized that the cause was before the Court upon its merits, for that,—amongst other reasons,—in said supplemental bill complainants took issue with the material allegations of said answer and sought to avoid the same, and this, under the rules and practice of said court, was not necessary if said cause was at hearing
71 simply upon the application for a temporary injunction; and for that in said amendment the complainants amplified and supplemented the allegations of their original bill and thereupon prayed "that they may have all of the relief as may be their due and as therein (that is in the original bill) prayed for and full protection against the manifest discriminations, inequalities and illegalities attempted to be perpetrated against them by defendants and they represent that they have no intangibles whatever and insisting that they have no intangibles they pray for protection against the assessment of the same. Or in the event that it be found that they have any intangibles (and they represent that they have not) then they pray that such intangibles be found at their true amount and far below the amount asserted—but in making this prayer they yield nothing of their contention that there are not intangibles." Wherefore, these defendants now say that by said amendment, so presented, the complainants in said Equity Cause No. 35, intended to and did put the entire matter at issue upon its merits, and that the only reason for the presentation of said amendment, under the circumstances, was to have the court grant complainants all of the relief which it could grant upon final hearing,—and such was the effect of the filing of such amendment,—and that thereby the complainants, at said hearing also, affirmatively prayed said court for

final judgment, at least, to the extent of "finding their intangibles at their true amount and far below the amount asserted." Defendants say, further, that all of the evidence taken at the hearing was taken, and was understood as being taken, in support of or in denial of, the allegations and prayers of said supplemental and amendment bills, as well as with respect to the allegations of the original bill, motion to dismiss and answer.

Thereafter, on the 19th day of July, 1915, the court announced that the issues would be resolved against the complainants, saying, amongst other things: "It occurs to me that the action of the Tax Board under the testimony stands unimpeached, and you
72 (meaning complainants) are not entitled to the relief you ask—It sems to me that the law has been fairly observed (meaning in the assessment of the intangibles of the complainants)—It occurs to me that the application for injunction should be denied and the bill dismissed; but I will give the matter such direction as to the latter suggestion as counsel for complainants may suggest." Thereupon counsel for complainants requested time to argue the case further, which was granted, and the court thereupon adjourned until 10 o'clock A. M. July 20th, 1915. On the 20th day of July, 1915, counsel for complainants further argued the case and the court then announced that "the prayer of the Complainants for an injunction is denied." Complainants took an exception in open court. At no time before the entry of the judgment of July 20th, 1915, set out before,—which entry followed the announcement of the court above quoted did the complainants ask the court to dismiss the bill or cause "without prejudice", although,—as these defendants now aver,—the court by the announcement of its decisions indicated that the cause was upon trial upon the merits and invited complainants to do so; as aforesaid, they did not do so, but on the contrary, permitted such final order to be entered which did not contain a provision "without prejudice". If they had asked the court for such a dismissal at the hearing such application would have been contested by the defendants there and they would have maintained that they were entitled to a dismissal upon the merits or an absolute adjudication against the complainants. And if the court had then entered an order of dismissal, "without prejudice" the defendants there could, and would, have appealed from said order, contending upon appeal that they had the right, under the pleadings and evidence, to an absolute order of dismissal with prejudice, or an absolute adjudication against the Complainants upon the merits. By the failure of the complainants to ask for an order "without prejudice" at the conclusions of the hearing, and by their conduct hereinafter mentioned, the defendants (there) were
deprived of their right and all opportunity to contest the
73 entry of an order o fdismissal "without prejudice" as well as their right of appeal from such an order and of their right and all opportunity to have the appellate courts to review such order to determine whether or not defendants were entitled to an absolute dismissal upon the merits, or an absolute adjudication against complainants, and thus finally to end the litigation.

The complainants thereafter on Nov. 3rd, 1915, without written motion, and without notice of any kind to the defendants or their counsel in Equity Cause No. 65, secured the order of Nov. 3rd. 1915, copied in their supplemental petition in this case. No notice of any kind was given the defendants, in equity cause No. 65, or their counsel of any request for such an order or the granting or entry thereof before or at the time of the same, and they did not learn of the same until February —, 1916, when counsel for defendants discovered it;

Defendants, there and here, had the right to relay and did, in the exercise of due diligence, rely upon the record and the conduct of complainants, upon the hearing of said Equity Cause No. 65, and, as aforesaid, such conduct will result in injury to them and to the public when they did and now represent if plaintiffs herein are allowed to take advantage of said order of dismissal "without prejudice" and to have the same given the effect claimed for it by them, and they are therefore estopped to plead or take advantage thereof, and for such relief these defendants pray.

(*b*) Because of the matters set forth in subparagraph (2) above, these defendants say that said order of dismissal "without prejudice" is without the effect claimed for it, and is of no effect, because the court had finally adjudicated the matters in controversy by the order of July 20th, 1915, which order remains unappealed from, unreversed and unaltered.

(*c*) Defendants say that said order of dismissal "without prejudice" hath not the effect claimed for it by plaintiffs or any effect because the United States District Court had no jurisdiction
74 to enter the same for that: The term at which the order of July 20th, 1915, was entered had long since expired by operation of law, and as a fact, before the entry of the order of November 3rd, 1915, and to give the order of Nov. 3rd the effect claimed for it, or any effect, would result to vacate, alter or amend the order of July 20th, entered at the former term; and further, because under Section 37 of the Judicial Code of the United States the said District Court was without power to take any further proceedings in said Equity Cause No. 65, after the entry of the order of July 20th, 1915.

(*d*) Defendants say that the defendants in Equity Cause No. 65 and those whom they represented, were entitled to notice of the application for the order of Nov. 3rd, 1915, and were entitled to a hearing thereon, and that said order having been entered without such notice or opportunity for hearing is without effect, null and void.

II. Replying to the matters set forth in subdivision II of plaintiffs' said supplemental petition they here refer to and adopt all of the matters and things set forth in subdivision I hereof above.

SEWALL MYER,
County Attorney, Harris County;
B. F. LOONEY,
Attorney General;
LUTHER NICKELS,
Assistant Attorney General,
Attorneys for Defendants.

Filed March 6th, 1916.
O. M. DUCLOS,
Clerk District Court, Harris Co., Texas,
By B. J. WITT,
Deputy.

Defendants' 2nd Supplemental Petn. in Reply to Def's' Supplemental Plea in Bar, etc.

Filed March 6th, 1916.

In the District Court of Harris County, Texas.

JAS. A. BAKER and CECIL A. LYON, Receivers of International & Great Northern Railway Company, et al.

vs.

KARL DRUESEDOW, Tax Collector, et al.

Second Supplemental Petition in Reply to the Defendants' Supplemental Plea in Bar.

To the judge of said Court:

75 Now come the plaintiffs and answer the supplemental plea in bar filed by the defendants herein, as follows:

I.

They demur to the same and say that it is insufficient in law.

II.

They deny all of the allegations therein contained.

WILSON, DABNEY & KING,
Attorneys for the Plaintiffs.

Filed March 6th, 1916.
O. M. DUCLOS,
Clerk District Court, Harris Co., Texas,
By B. J. WITT,
Deputy.

Defendant Druesedow's Plea in Reconvention & Cross Action.

Filed March 12th, 1916.

In the District Court of Harris County, Texas, 80th Judicial District.

No. 68800.

JAS. A. BAKER, Receiver, et al.

VS.

KARL DRUESEDOW et als.

To said Court:

Comes now Karl Druesedow, defendant in the above styled and numbered cause, and files this his plea in reconvention therein, and says:

I.

That as shown by plaintiffs' petition, he is the regularly selected and qualified Tax Collector of Harris county, Texas, and as such is entitled to receive the State and County taxes due by plaintiffs for the year 1915, upon the valuation of their properties apportioned to Harris county, out of the total valuation thereof made by the State Tax Board for said year, to-wit: the sum of $603,227.00 the amount of taxes due thereon being the principal sum of $6,605.34 and accrued interest and penalties thereon.

Wherefore said defendant prays for judgment for the amount of taxes, penalties and interest due by plaintiffs by reason of the premises, and for general relief.

SEWALL MYER,
County Attorney,
Attorney for Defendants.

76 Filed March 12th, 1916.
O. M. DUCLOS,
Clerk District Court, Harris Co. Texas,
By B. J. WITT,
Deputy.

Answer of Plaintiffs to Defendant's Druesedow's Cross Action & Plea in Reconvention.

Filed March 12th, 1916.

District Court, Harris County, Texas, 80th Judicial District.

JAS. A. BAKER & CECIL A. LYON, Receivers of International & Great Northern Railway Company et al.

VS.

CARL L. DRUESEDOW, Collector of Taxes for Harris Co. et al.

Now come the plaintiffs and answer the defendant Druesedow's cross action and plea in reconvention, filed March 12, 1916, herein as follows:

1. They demur to the same and say that it is insufficient in law.
2. They deny all of the allegations therein contained.
3. Specially pleading, the plaintiffs re-aver all of the matters stated in their first amended original petition.
4. Wherefore, upon all of the above, plaintiffs pray that the defendants take nothing by reason of their cross action or so-called plea in reconvention, and further that they, the plaintiffs have relief as hereinbefore prayed for.

WILSON, DABNEY & KING,
Attorneys for Plaintiff.

Filed March 12, 1916.
O. M. DUCLOS,
Clerk District Court, Harris Co. Texas.
By B. J. WITT,
Deputy.

Judgment.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of the International & Great Northern Railway Company et al., Plaintiffs.

VS.

KARL L. DRUESEDOW, Tax Collector of Harris County, et al., Defendants.

Be it remembered that this case came on for trial on March 12th, 1916, upon the following pleadings, to-wit:

77 (*a*) The plaintiffs' first amended original petition, filed March 6th, 1916.

(*b*) The defendants' plea in abatement and original answer filed March 6th, 1916.

(*c*) The plaintiffs' first supplemental petition filed March 6, 1916.

(*d*) The defendants' supplemental plea in bar and supplemental answer filed March 6, 1916.

(*e*) Plaintiffs' second supplemental petition in reply to the defendants' supplemental plea in bar and supplemental answer filed March 6, 1916.

(*f*) The defendants' cross-action and plea in reconvention filed March 12th, 1916.

(*g*) The plaintiffs' answer to defendants' cross-action and plea in reconvention filed March 12, 1916.

And a jury having been waived and all issues of matter and fact submitted to the court, and it having been agreed that the plea in bar and the plea to the jurisdiction should be taken with the case, it was found and ordered and ruled as follows:

I.

(1) The court overruled and now does adjudge that demurrer numbered (1) in I of plaintiffs' supplemental petition filed March 6th, 1916, be overruled, to which ruling the plaintiffs exceped.

(2) The court overruled, and does now overrule the demurrer numbered I in the second supplemental petition filed March 6th, 1916, to which ruling the plaintiffs except.

II.

Having heard the evidence upon the pleas in bar and in abatement and to the jurisdiction of this court contained in Sections I and II of the Defendants' plea in abatement and original answer filed March 6th, 1916, and being of the opinion that they were not well taken, and that the hearing held in the Federal court was upon an application for a temporary injunction the court is of the opinion
78 that such pleas are not well taken and does now overrule the same and adjudge that the matters herein presented are not res adjudicata, and that this court has jurisdiction of this case, to each of which rulings the defendants duly excepted.

III.

The court further proceeding to rule upon the demurrers which demurrers it was agreed, as far as not ruled upon above should be taken with the case and ruled after the disposition of the matters stated in Section II, above, does now rule thereon as follows:

(1) Demurrers numbered IV, V, VI, VII, VIII, IX, X, and all the subdivisions thereof as contained and so numbered in the defendants' original answer filed March 6, 1916, are now overruled, to each of which rulings the defendants duly excepted.

(2) The plaintiffs' demurrers as follows, to-wit:

1 contained in Sec. I of their first supplemental petition filed March 6, 1916, and their demurrer numbered 1 contained in their answer to defendants' cross-action filed March 12, 1916, are now all overruled, to which ruling plaintiffs except.

IV.

And having heard the evidence on the whole case, the court being of opinion that the plaintiffs show no equity upon any branch of their case, and are not entitled to an injunction, or any other relief as against the defendants, to-wit: Karl L. Druesedow, Tax Collector of Harris county, Texas, W. H. Ward, County Judge of Harris county, Texas, W. H. Lloyd, County Commissioner of Harris county, J. A. Smith, County Commissioner of Harris county, W. H. Kiser, County Commissioner of Harris county, Texas, and D. Barker, County Commissioner of Harris county, Texas, the last five constituting the Commissioners' Court and Board of Equalization
79 of Harris county, Texas, it is considered, adjudged and decreed that the plaintiffs Jas. A. Baker, and Cecil A. Lyon, Receivers of the International & Great Northern Railway Company, and the International & Great Northern Railway Company take nothing by their suit against the said defendants, or any of them, and that they have no injunction restraining the collection of the taxes herein involved, to-wit: $6,605.34, and for which judgment is given below, together with interest thereon, or other relief, and it is now considered, adjudged and decreed that plaintiffs take nothing by their suit, to all of which ruling, decree and judgment of the court the plaintiffs except.

V.

And furthermore, upon the cross-action of the defendants for $6,605.34 taxes sued for as due upon the value of $603,227.00 of intangibles (apportioned to Harris county by the State Tax Board) and due February 1st, 1916, it is considered, decreed and adjudged by the court, as follows:

(1) That the defendants do not recover any penalties.

(2) That the defendant Karl L. Druesedow, as Tax Collector of Harris county and his successors in office, if he should have successors during the pendency of this case, for the use and benefit of the State of Texas, and Harris County according to their respective rights should recover of the plaintiffs the taxes sued for to-wit: $6,605.34, together with the sum of $61.76 interest thereon from February 1st, 1916, to this date. Wherefore, it is now considered, adjudged and decreed that the defendant, Karl L. Druesedow, as Tax Collector of Harris county, Texas, and his successors in office if he shall have successors during the pendency of this suit and for the use and benefit of the State of Texas and Harris County as their respective rights may exist do have and recover of Jas. A. Baker

and Cecil A. Lyon, as Receivers of the International & Great Northern Railway Company, and of the International & Great Northern Railway Company $6,667.10, together with interest from
80 this date at the rate of 6% per annum until paid, to all of which plaintiffs except.

VI.

It is further adjudged that all of the defendants in this case, together with the officials of this court, do have and recover of the plaintiffs as Receivers of the International & Great Northern Railway and of the International & Great Northern Railway Company, all costs in this behalf expended, to which the plaintiffs except.

VII.

It appearing to the court that the International & Great Northern Railway Company is now in receivership running in the United States District Court for the Southern District of Texas at Houston, Texas, taken out in the case styled Central Trust Company of New York, Complainant vs. International & Great Northern Railway Company, et al., Defendants, No. 49, in Equity, it is ordered and adjudged that no execution be issued on this judgment, but that this judgment may be certified into that court, to which the plaintiffs except.

This judgment and decision of the court was finally reached on the date hereof this 28th day of March, 1916.

Recorded in Vol. 1 page 419 of the Minutes of the District Court of Harris county, Texas, for the 80th Judicial District.

Conclusions of Law and Fact of the Court.

Filed March 29th, 1916.

In the District Court, 80th Judicial District of Texas.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of the International & Great Northern Railway Company et al., Plaintiffs,

vs.

KARL L. DRUESEDOW, Collector of *Texas* for the County of Harris, Texas, et al., Defendants.

81 In compliance with request therefor made by plaintiffs I do find and file the following conclusions of fact and law herein:

Conclusions of Fact.

(1) I find that the State Tax Board in making the valuation of Railroad Intangible properties for the year 1915 considered all evi-

dence and information before it, and that in making the valuations complained of in this case acted in good faith and no sufficient evidence has been offered to show that their valuations were brought about, or affected, by fraud, bad faith, or other improper influences, and the evidence shows that such valuations reflect their best and honest judgment as to what the valuations should be.

(2) In making the findings of value as hereinafter stated, I have adopted the valuations of the properties of plaintiffs made by the Railroad Commission of Texas from time to time as the bases, believing from the evidence that it is just to do so; in doing so, however, I realize, from the evidence that the values of real estate along the lines and in the neighborhoods of the plaintiffs' properties have substantially increased in value since the dates of such valuations by the Railroad Commission, and if it should be proper to allow therefor as to right-of-way and other real estate belonging to plaintiffs the valuations found therefor by me would be substantially increased; I have departed from the Railroad Commission's valuations of real estate in certain instances hereinafter noted and allowed for the values of certain real estate as they existed on or about January 1st, 1915, minus the values allowed therefor by the Railroad Commission, for the reason, in such cases, such real estate is reasonably adapted to use for general commercial purposes and the possibility of its use is not confined to railway purposes.

(3) The physical properties of plaintiffs in Harris county,—including the rolling stock apportioned to said county on the mileage basis,—were rendered and assessed for the year 1915 at the total sum of—$1,106,105.00.

82 The valuations placed by the Railroad Commission of Texas on the same properties, aggregated the sum of $2,009,822.-9 and including rolling stock apportioned to Harris county, aggregated the sum of $2,331,822.00.

Since the valuations by the Railroad Commission additions and betterments have been made to said properties in said county to the extent of approximately, $400,000.00.

In adopting the above figures, as representing the value of said properties in said county on January 1st, 1915, I have allowed nothing for increase in values of road, road-bed, structures, or real estate,—except the particular items of real estate next mentioned,—although the evidence tends to show that abutting property, and real estate generally along the route of the line of plaintiffs' railroad, have substantially increased in value since the dates of the Railroad Commission's valuations.

The plaintiffs hold certain real estate in and near the City of Houston which is suitable for general uses and purposes and of all which is not actually being used for pure railway purposes, reasonably calculated for railroad purposes and reasonably held therefor, and as to this real estate I allow additions to the above figures measured by the difference of the amounts allowed by the Railroad Commission in its valuations therefor and their values about Jan. 1st, 1915.

I allow $208,380 difference between present value of 94.6 acres of land on and near the Turning Basin and value allowed by the Railroad Commission;

I allow $90,000.00 for such difference with respect to a 19.9 acre tract just north and adjoining Buffalo Bayou in the city of Houston,—same being shown on Engineer's Map No. 38-*b* in evidence; I also allow $100,000.00 for such increased value of portions of Parcels 4, 4*a*, 3, 8 shown on Engineer's Map 38-*b*.

I allow $75,000.00 for such increased value for certain real estate marked "D" on Engineer's Map S-1-*a*.

The total value found by me on these bases of the tangible properties of plaintiffs in Harris county on January 1st, 1915, and
83 subject to taxation is, therefore, the sum of $3,205,202.09. This property was rendered and assessed for taxation at the sum of $1,106,105.00, or at about 34% of its value as found. The Intangible values apportioned to Harris county by the State Tax Board is the sum of $603,227 making the total taxable values for the year of 1915 the aggregate sum of $3,809,379 which aggregate values were assessed at the sum of $1,709,332, or about 45% of their values as found. If the aggregate of these values,—that is, of tangibles, intangibles and rolling stock,—had been assessed at 50% of their said values they would have been assessed at the sum of $1,904,689.

Conclusions of Law.

(1) The evidence is insufficient to impeach the valuations made by the State Tax Board and complained of in this case, and the relief prayed by reason of the allegations in Subdivisions I and II of the petition should be denied.

(2) The evidence shows that the tangible properties of the plaintiffs subject to taxation in Harris county were for the year of 1915 assessed at a proportion of their true values lower than the proportion of assessed to true values of property generally, and sufficiently lower to more than make up for any discrimination against plaintiffs by reason of their intangibles having been assessed at full value, if they were so assessed; in other words, the total properties of plaintiffs in Harris county,—tangible, rolling stock and intangible,—as assessed for 1915, were assessed at less than 50% of their real true values, while other property in the county generally was assessed at at least 50% of its true value; I conclude therefor-, that plaintiffs have not shown themselves entitled to the relief prayed for by reason of the allegations contained in Subdivision III of their petition.

J. D. HARVEY,
Judge Presiding.

Filed March 29th, 1916.
O. M. DUCLOS,
Clerk District Court, Harris Co., Texas,
By B. J. WITT,
Deputy.

84 *Motion by Plaintiffs That the Court Find Certain Conclusions of Fact.*

Filed March 30, 1916.

In the District Court of Harris County, Texas, 80th Judicial District.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of International & Great Northern Railway Company, et al.,

versus

KARL L. DRUESEDOW, Tax Collector, Harris County, Texas, et al.

The court having filed conclusions of fact is moved by the plaintiffs to make the following findings of fact.

I.

In regard to the plea in bar and abatement Nos. I and II in defendants' Original Answer, filed February 8th, 1916;

(1) In the United States District Court at Houston there is now running a receivership taken out in the case of the Central Trust Company of New York vs. International & Great Northern Railway Company, in which the plaintiffs, receivers herein, were appointed Receivers on August 10, 1914, upon which appointment they immediately qualified. In the order appointing them they were authorized and empowered to prosecute suits in their names as Receivers or in the name of the International & Great Northern Railway Company such as might upon the advice of counsel be in their judgment necessary for the proper protection of properties committed to their charge, which were all the properties of the Railroad, and also to defend and compromise all suits brought against them. They have been advised by counsel to bring this suit.

(2) In June, 1915, the Receivers presented to the Judge of the United States District Court for the Southern District of Texas at Houston, where the Receivership is pending, a bill termed an ancillary bill to the suit of the Central Trust Company, and in that bill they sued members of the State Tax Board of the State of Texas, who were and are Mr. Bagby, Tax Commissioner, Mr. Terrell, Comptroller and Mr. McKay, Secretary of State, and in the bill *attached*, as they do in this suit, the assessment made by the State Tax Board,
and also claimed that the general scheme of assessment in the
85 State of Texas of other property was less than its full value and so in the counties penetrated by the railway.

(3) In this bill they prayed for a stay order that the case be set down for hearing for a temporary injunction, and that upon a final

hearing they have a perpetual injunction prohibiting the members of the State Tax Board from certifying the assessments made by them to the assessors of the various counties.

(4) Upon the presentation of this bill the Federal Judge granted leave to the Receivers and the Railway, complainants therein, to file the same and issued a stay order prohibiting members of the State Tax Board from certifying their assessments until a hearing on the prayer for temporary injunction, which hearing was set down for the 15th of July, at which time the members of the State Tax Board were required to be present to show cause why a temporary injunction should not be granted until final hearing.
This order was duly served.

(5) On the 15th day of July, 1915, the members of the State Tax Board herein appeared at Houston before the Judge of the Federal Court filed their answer to the pleadings of the complainants, and the hearing was held from day to day until the 20th of July, when the Judge entered an order declaring that permission to the Receivers to bring the bill should not have been granted and revoking the permission for them to bring that bill and denying the temporary injunction.

(6) Thereafter the Federal Judge on the motion of complainants dismissed that suit, the order of dismissal stating that it was dismissed without prejudice to the litigation by complainants of the matters therein involved.

(7) After all of the above matters were done, this suit was instituted in this District Court of Harris County, Texas.

86 II.

(1) The State Tax Board in due course and before June 18th, 1915, served on the plaintiffs herein a notice that the Board had made a preliminary assessment of the intangibles of the railway at $14,483,200.00 and notified the plaintiffs herein to show cause on June 18, 1915, why the same should not be made final.
Mr. Bagby, a member of the Board, handed to plaintiffs a copy of the formula plead in the petition resulting in a statement of intangibles at $13,483,200.00.

(2) There was an error upon the face of this formula which the plaintiffs herein called to the attention of the Board; whereupon the Board changed its preliminary estimate before June 18th, 1915, and made it $10,743,223.00, and notified the plaintiffs of such change. In June 1915, before the hearing, Mr. Bagby a member of the Board, handed to the complainants the formula resulting in this last statement of intangibles, and on the trial of this case testified that he may have said to plaintiffs' attorney on that occasion that this formula showed the method of estimate. This formula is plead in plaintiffs' petition.

(3) The hearing on June 18th, 1915, by the State Tax Board was held at Austin, Texas, and after said hearing the Board adhered to the preliminary corrected valuation of intangibles of $10,743,223.00, and apportioned this value on a mileage basis among the thirty-seven counties penetrated by the International & Great Northern Railway, which is 1,106 miles, approximately, of main line track, all in Texas, and in Harris county 62.9 miles. The Board apportioned to Harris county as its mileage proportion of this valuation $603,227.00.

Having made the apportionment the Board certified the respective apportioned amounts to the different Tax Assessors who placed the same upon the rolls as provided by law.

The rate of taxation in Harris county for 1915 was in the aggregate assessed by the State authorities and Commissioners Court at
87 $1.09½ per hundred dollars of valuation, and they levied that rate upon the $603,227.00 and extended upon the tax claims and receipts of the county $6,605.34 as the amount due as taxes upon intangibles and collectible by the Tax Collector of Harris county, a defendant herein.

(4) The State and County taxes in Harris county, upon the tangibles of the railway, amounted to $16,960.49, exclusive of $6,605.34 the tax upon the intangible assessment. The tax upon the tangibles was paid by the plaintiffs before February 1st 1915.

(5) At the hearing prescribed by law and held at Austin, June 18th, 1915, the plaintiffs appeared before the State Tax Board and introduced evidence of the following matters. None of the evidence of the plaintiffs introduced before the Tax Board was disputed:

(*a*) That the Railroad Commission valuation of the railway property was $32,471,027.05, and that the Commission had not included in its valuation intangibles, but that this was a valuation of physicals. In addition evidence was introduced that the railway had made betterments since the last Railroad Commission valuation up to January 1st, 1915, costing $1,542,065.02, which betterments at cost added to the Railroad Commission valuation made a total of $34,013,092.07.

It is now found that the matters stated under this head "(*a*)" were proved on this trial to be true, and that the total value of the physicals up to January 1st, 1915, were $34,013,092.07, except as this may be below modified.

(*b*) Evidence was also adduced without contradiction that on August 10th, 1914, the Railway had been placed in the hands of receivers for default on the principal of mortgage of 1911, and that a decree of foreclosure had been entered of that mortgage on May 17th, 1915.

The truth of the matters of which evidence was introduced at said hearing were proved on the trial of this case as far as recited in this sub-section "(*b*)."

(*c*) At the hearing before the State Tax Board evidence
88 was also introduced to the effect that the net income for the properties for 1912 had been $2,084,149.50, which would

capitalize at seven per cent $29,743,564.28, and that according to the records the year 1912 was the best year in the history of the properties.

For the year 1913 that the net income was $1,155,660.92, capitalizing at 7 per cent $16,523,727.43, and that for the year 1914 the net income was $65,405.27 capitalizing at 7 per cent $934,361.00.

It is now found that the matters recited in this paragraph "(c)" were proved upon the trial of this case.

(d) At the hearing by the State Tax Board evidence was introduced by the plaintiffs here that the aggregate of the stock and bonds and lien obligations of every character of the Railway were $32,154,000.00 and that the same was short of the Railroad Commission valuation, and that of this amount $4,822,000 is stock, of which $3,400,000 is preferred and $1,422,000.00 is common.

The matters now stated in this section "(d)" were proved to be true on this trial and are so found.

(e) Evidence was introduced before the State Tax Board that the properties of the present Railway had been sold out under mortgage foreclosure in 1911, except that certain additions have been made thereto; and that the foreclosure was of the defunct International & Great Northern Railroad Company, and that the capital stock of that Railroad of over $10,000,000.00 as well as an indebtedness of over $8,000,000.00 had been wiped out, and that the property was bought in on foreclosure of the mortgage of 1881 with decree of foreclosure which was at the head of such debts and such stocks in law and right.

It is now found that all of these matters recited in Section "(e)" were proved on this trial.

(6) At this hearing the Complainants contended that the statement in the report which they had made to the Board wherein they had stated the actual value of the physicals, other than rolling
89 stock at $26,026,810.78, was incorrect, and brought testimony explaining how that claimed mistake had been made in the report to the Commission, and stated that they claimed an actual value for deduction, including rolling stock, of their physicals, at the Railroad Commission's valuation thereof $32,471,027.05, with additions and betterments as above not yet valued by the Commission, or a total of $34,013,092.07 and suggested to the Board that this amount should be deducted on account of their physicals.

(7) At the hearing before the Board on June 18th, 1915, in Austin, the plaintiffs requested the Board orally and in writing to explain its formula, and the Board entered into some discussion of the calculation, contained in the formula, and insisted that the formula was correct.

(8) At the hearing held in Austin on June 18th, 1915, the plaintiffs requested the Board in writing, as well as orally, to state what bases, if any, the Board had outside of its formula. The Board refused to make any explanation or statement other than a discussion

of the processes used in the formulas and in the formula of the Texas & Pacific Railway applied, and that the ratio between the Texas & Pacific average gross income and capitalization of .125 approximated the market quotations of the stock of that Road.

(9) I find that the assessment of intangibles made by the Board as the value of intangibles of the International & Great Northern Railway Company was made using the formulas set forth in the plaintiffs' petition.

(10) I find that it is impossible for me to determine what bases there were, if any, for the finding of the Board other than the formulas.

(11) I find that to no extent was the finding of the Board as to the value of the intangibles of the International & Great Northern Railway Company based upon a consideration of the net income of the properties of the Railway.

(12) I find that there have been additions and betterments from time to time made to the properties of the sold out
90 International & Great Northern Railroad Company and the present Railway, and that the average income on the Railroad Commission's valuation has been for fourteen years measuring from the fiscal year ending June 30th, 1914, back .04636 per cent.

(13) I find that the properties of the railway have been well managed, including the management during such period of fourteen years, and that such fourteen years fairly shows the experience of the properties.

(14) I find that the Board considered the term "intangibles" to be an "arbitrary" term, and that to some extent which I cannot determine under the evidence, it included in the assessment made, tangibles, with an idea of bringing up the amount of values to be subjected to taxation and compensating for tangibles omitted, or taxed at a supposedly too low rate locally.

(15) I find that the Tax Board, in assessing intangibles, applied its formula and the Texas & Pacific formula according to its method, to a large number of railroads, but that it did not completely apply its formulas to all of the railroads.

(16) I find that the Board, in applying its formulas to the I. & G. N. Railway, so applied it that it was all equivalent to a process whereby the average gross income for four years was multiplied by either and the result divided by the total capitalization as stated by the Board, and then the quotient used as a multiplier of the capital stock.

(17) I find that the Board so applying the formulas wide variations were made between different railroads, and that the results of the formulas were based upon no relations which were applicable.

(18) I find that the calculations of the formulas only took into consideration gross income, and not net income.

(19) I find that the formulas present no bases for making the assessment, and have no relation to the right determination of the amount of the intangibles of the several roads.

91 (20) Subject to my other findings herein, which may have a bearing upon value, I find that the value of the physicals of the I. & G. N. Railway Company on January 1st, 1915, was the Railroad Commission valuation thereof, to-wit: $32,471.027.05 plus additions and betterments not valued by the Railroad Commission of the cost of $1,542,065.02 making a total of $34,130,092.07.

(21) I find that the Railroad was and is entitled to an income of six per cent upon its properties or capital, and that six per cent would not be an excessive income.

(22) I find that if the average income for fifteen years be capitalized at 6% then that the total value of the properties on January 1st, 1915, owned by the railway, tangibles and intangibles are $24,870,234.00; if that be the correct method of ascertaining their values.

(23) I find that the true value of the properties as found by the State Tax Board, tangible and intangibles, owned by the I. & G. N. Railway was $39,116,033.00, but I find that the reproduction cost of the physicals of the I. & G. N. Railway in 1915, and at the present time, would be in excess of $39,116,033.00.

(24) I find that the total lien indebtedness against the I. & G. N. Railway properties on January 1st, 1915, was $27,332,000.00, and that the floating debt on that date was $3,242,470.85, or a total of obligations ahead of stock of $30,574,470.00.

(25) I find that the capital stock of the I. & G. N. Railway at par is $4,822,000.00 and that it was valued by the State Tax Board at $12,934,533.00.

(26) I find that a receivership was taken out and a decree of foreclosure was entered by the District Court of the United States for the Southern District of Texas, on May 17th, 1915, in the suit of the Central Trust Company of New York, complainant, vs. I. & G. N. Railway et al. defendants, foreclosing a mortgage of the railway of 1911, whereby a decree was entered for a total of $12,908,-
92 461.06, together with interest thereon from May 17th, 1915, until paid at the rate of 6% per annum. This foreclosure was against all of the properties of the Railway. The date of sale was not set.

(27) I find that the other lien indebtedness are ahead of the decree of foreclosure.

(28) I find on January 1st, 1915, the stock of the I. & G. N. Railway Company amounting to $4,822,000.00 par had no market value, and that its true value at that time, if any it has, was only a very small proportion of its par value, and that it had no real value.

(29) I find that the State Tax Board did not act in good faith, and that their statement that the International & Great Northern Railway Company had intangibles of $10,743.23 is so gross an error; especially when taken upon the statement that the whole properties were worth $39,116,033.00, and that $4,822,000.00 of the stock of this foreclosed corporation was worth $12,934,533, or a premium of $8,112,533, that there is no explanation therefor except that it was done with a willful intention not to make a true valuation, and that the processes followed by the Board are such as could not be followed by any rational mind seeking a right result.

(30) I find that there were wide variations made by the Board in assessing the claimed intangibles of the different railroads, some of which were active competitors of the International & Great Northern Railway Company, and that as between the different railroads the formulas, which it applied, necessarily resulted in wide variations, and where departed from, that the variations and inequalities were unexplainable upon any rational basis and were arbitrarily made, to the prejudice of the plaintiffs.

(31) I find that the gross income of the International & Great Northern Railway, and of the other railroads, was no proper basis for ascertaining their value.

93 (32) I find that the valuation placed upon properties of the I. & G. N. Railway Company are grossly excessive.

(33) I find that a valuation of intangibles made by the State Tax Board, of the I. & G. N. Railway Company, are erroneous and cannot be supported upon the facts.

(34) I find that the State Tax Board in assessing the claimed intangibles of the I. & G. N. Railway Company followed methods which no rational mind can approve.

(35) I find that the State Tax Board based its calculation upon gross income.

(36) I find that the value of the properties of the I. & G. N. Railway Company on January 1st, 1915, including all of its intangibles, as well as tangibles, if any intangibles, it had (I do not mean to find that it had any) was not over $25,000,000.00. I reach this estimate by capitalizing its income at 6% taking the average for fourteen years and assuming that it would make the average income for fourteen years back of June 30th, 1914, on the Railroad Commission valuation.

(37) I find that the reproduction cost of the physicals of the I. & G. N. Railway Company as they existed January 1st, 1915, would exceed the Railroad Commission valuation thereof plus the cost of the unvalued betterments stated above.

(38) I find that the I. & G. N. Railway Company had no intangibles on January 1st, 1915.

(39) I find that the I. & G. N. Railway Company, if it had any intangibles, did not have them to any extent, or to any value as found by the State Tax Board. If any there were they were so small in extent and value as to be incapable of valuation by me.

III.

Valuations and Assessment in Harris County, Texas.

(1) I find that the assessing and equalizing authorities of Harris county, Texas, preferred to have in force in 1915, a standard of 66 2/3% of the value of real estate in that county for taxation, but that real property in that county was assessed at not over 47
94 per cent of its market or cash value, or true value, in 1915, if it had no market or cash value.

(2) I find that the assessing and equalizing authorities of Harris county had in 1915 a standard of 60% of the true or market value of stocks of goods for assessment. What value they did get I am unable to determine.

(3) I find that in 1915 the assessing and equalizing authorities in Harris county had a system of assessing bank properties at 70% of their book value, but that in at least some of the principal banks the assessment was 50% of the true market value.

(4) I find that range cattle in Harris county, Texas, were assessed throughout at a system of $8.00 per head, and that the average value of such range cattle in 1915 was $30.00 per head, and that not over 8/30 of the actual value of these cattle were assessed under this system.

(5) I find that the assessing and equalizing authorities in Harris county, in 1915, assessed no loans of money, and no money on hand whatever, and had a system not to assess them unless the same were included in the value of bank stock assessed. I find that there are a large number of corporations, such as oil and industrial corporations, and various others, engaged in the manufacturing and selling enterprises, and persons and partnerships so engaged who were engaged in these activities in Harris county, Texas, and in the City of Houston in 1915, and that there was a system by the assessing and equalizing authorities of Harris county, Texas, in 1915, to assess no intangibles, and that no intangibles were assessed in connection with tangibles, unless it be in the case of the assessment of bank stock. No reference is now had to the assessment of intangibles of railways which were assessed by the State Tax Board, and not in Harris county.

(6) I find that there were large intangibles values in Harris county which were not assessed, and on which no taxes were paid.

95 (7) I find that the tangibles of the I. & G. N. Railway Company in Harris County, were in 1915, assessed on the

same proportion of value as the tangibles of the ten other railroads of that county in that year.

JAS. A. BAKER AND CECIL A. LYON,
Receivers of the I. & G. N. Ry. Co.,
The International and Great Northern Ry. Co.,
By WILSON, DABNEY & KING,
Their Attorneys.

Filed March 30th, 1916.
O. M. DUCLOS,
Clerk District Court, Harris Co., Tex.
By B. J. WITT,
Deputy.

Motion by Plaintiffs that the Court Find Certain Conclusions of Law.

Filed March 30th, 1916.

No. 68800.

In the District Court of Harris County, Texas, 80th Judicial District.

JAS. A. BAKER and CECIL A. LYON, Receivers of International & Great Northern Railway Company, et al.

versus

KARL L. DRUESEDOW, Tax Collector Harris County, et al.

The Court having filed conclusions of law, the court is moved by the plaintiffs to make the following findings of law.

Conclusions of Law.

(1) I find that the proceedings in the United States Court did not constitute any estoppel or res adjudicata and are no obstacles to this suit.

(2) Chap. 4 of the Title "Taxation" in Revised Statutes is unconstitutional.

(3) Chapter 4, Title 126 of the Revised Statutes of Texas under which the State Tax Board acted is unconstitutional and void, because it lodges in that Board the power to make assessments in conflict with Sections 8, 11 and 14 Article VIII of the Constitutional of the State of Texas and other provisions of that Constitution
96 in providing for method of assessment not local in its nature.

(4) Chapter 4, Title 126 of the Revised Statutes of Texas under which the State Tax Board acted is unconstitutional and void and in conflict with Section 1 of Article 14 of the Amendments to the Constitution of the United States in that it abridges the privileges

and immunities of the plaintiffs herein and operates to deprive them of their property without due process of law, and denies to them the equal protection of the law.

(5) Chap. 4, Title 126 of the Revised Statutes of Texas under which the State Tax Board acted is unconstitutional and void because it is in conflict with the Constitution of the State of Texas wherein it is provided that no one shall be deprived of his property without due process of law, and that every one shall have the equal protection of the law.

(6) Chapter 4, Title 126 of the Revised Statutes of Texas and Article No. 7414 in the present Revised Statutes of Texas is unconstitutional and void wherein it attempts to provide for a double ad valorem tax, and wherein it makes such double ad valorem taxation possible by providing for the assessment of intangibles, if any, twice and providing for the taxation of such intangibles twice and making the same possible.

(7) Chap. 4 of Title 126 of the Revised Statutes of the State of Texas and Section 7414 thereof are unconstitutional and void because they except from the operation of the statute numerous individuals and corporations having intangibles and make it applicable to a limited number of subjects not legally to be so classified and is thereby in conflict with the Constitution of the State of Texas and the First Section of the 14th Amendment to the Constitution of the United States denying to the plaintiffs the equal protecion of the law and classifying them as subject to the machinery of the State Tax Board when they are not in any way subject to the same.

(8) Tangibles must be assessed locally, and it is contrary to the Constitution and laws of Texas that they should be assessed under the term of intangibles, and thereby distributed on a mileage
97 bases for taxation outside of the counties in which they lie.

(9) The Constitution of the State of Texas and the laws of Texas require that all properties tax- on the ad valorem principle should be taxed upon a uniform and equal basis of valuation, and that no property should be omitted.

(10) Under the facts of this case the right way to value the aggregate of tangibles and intangibles would be by valuing the same for railroad purposes, upon the basis of the net income of the properties taken, over the experience of a reasonable number of years, and at a reasonable rate of interest.

(11) When an assessing authority uses a wrong principle of estimating value of arriving at the quantity of the thing assessed, and when such principle is one which a rational mind cannot follow, the assessment should be set aside.

(12) When a wrong system is adopted, or a wrong formula or formulas, then the assessment must be set aside.

(13) When an assessing authority assesses a thing not owned by the tax payer, as owned by him, to the extent of the value so at-ributed, the assessment should be abated; and so, on the same principle when an extent or quantity is attributed to a tax payer which he does not possess.

(14) In case that an assessing authority acts with gross error then the assessment should be set aside, at least when the error is so gross as to shock all sense of equity.

(15) When an assessing authority acts from a wrong volition and purposely makes a wrong assessment, the assessment should be set aside; and also though there be no intent to injure or do a wrong, when made on wrong or illegal principles.

(16) No assessment can be supported which is the result of the application of theories or principles, or based upon such action as no rational mind could follow or approve.

(16-A) No assessment can be supported which is made in contradiction to all the evidence.

98 (17) It is the duty of the assessing party or person to explain the bases of assessment when requested to do so at the right time; and legal fraud not to so explain.

(18) An assessment will not be supported when recklessly made or in contradiction to all evidence.

(19) Applying the above principles to the facts of this case, I find that the assessment made by the State Tax Board must be held illegal,—

Because,

(*a*) Made against all evidence.

(*b*) Because based upon the wrong principle and the wrong formulas, which necessarily led to the wrong result—and inequalities between tax payers of the same class.

(*c*) Because the Tax Board used formulas having no relation to the right principles, and which could only mislead, and applying them to a large number of railroads.

(*d*) Because methods used could be followed and approved by no rational mind.

(*e*) Because the assessment of the Board was so grossly excessive as to be explainable upon no theory except that the Board acted on utterly wrong principles, or did not desire to reach a right result.

(*f*) Because the Board refused to explain upon what basis it acted, if any, outside of the formulas.

(*g*) Because the Board grossly discriminated as against the plaintiffs, and in favor of some railroads.

(*h*) Because no intangibles existed at all, or to any extent or value as found by the Board.

(*i*) Because the Board did not act in good faith and with the purpose of finding the real amount or value of intangibles.

Wherefore whether Board acted in good faith or not, it did not act by due process of law and denied to the plaintiffs the equal protection of the law as guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States and by the Constitution of Texas.

(20) When a statement and practice of valuation of property in a county for taxation is below its value, the owners of other property have a right to have a court reduce the value and taxation of their property proportionally.

(21) When tangibles are on a system assessed below their true value in a county, the assessed intangibles should bear a reduction in their value; but subject to any adjustment by bringing up the assessment of the tangibles, if they are assessed below the general average of assessment of other properties in the county; provided, however, that this equalization should not be made when it would involve a dislocation from the proportions of the assessments made of property of the same character, or above the system of assessed proportions of other property.

(22) It would be illegal and violation of the equal protection and due process of law under the facts of this case to raise the assessment of the intangibles of the International & Great Northern Railway above the rate of assessment at which they are assessed along with the ten other railways in Harris county, Texas, and it also would be illegal to make such raise of valuation without taking into consideration the rates at which property other than real estate is assessed.

(23) It being shown that no intangibles whatever of any person, partnership or corporation are taxed in Harris county, or attempted to be assessed for taxation other than those of the railroads, if any, and to some extent of banks, if the same is reflected in the value of the stock, and it further being shown that there are a large number of corporations and individuals doing business in Harris county of whom no inquiries are made for intangibles, and it being shown that they and all loans and moneys are systematically omitted from taxation, the taxation of intangibles, if permitted, would be illegal and would deny to the plaintiffs the equal protection and due process of the law as guaranteed to them by Section I of the 14th Amendment to the Constitution of the United States, and by the Constitution of Texas, and as guaranteed to them in the Constitution of Texas wherein it is provided that taxation on the ad valorem principle should be equal and uniform.

(24) Under the facts of this case and taken into consideration all of the facts found, as to classes of property and the assessment

thereof in Harris county, if the plaintiffs had intangibles in Harris county they should not be taxed.

JAS. A. BAKER AND
CECIL A. LYON,
Receivers of the I. & G. N. Ry. Co. and the International & Great Northern Ry. Co.,
By WILSON, DABNEY & KING,
Their Attorneys.

Filed March 30th, 1916.
O. M. DUCLOS,
Clerk District Court, Harris Co., Texas,
By B. J. WITT,
Deputy.

Order of the Court Allowing Pltffs. to File an Amended Motion for New Trial.

Vol. 1, p. 434.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of International & Great Northern Railway Company, et al.

versus

KARL L. DRUESEDOW, Tax Collector of Harris County, et al.

March 30th, 1916.

Whereas, in this case the court announced his judgment on March 28th, 1916 and the judgment was formulated, dated and entered of that date; and

Whereas, the plaintiffs on this 30th day of March 1916, filed their motion for a new trial, and on this same 30th day of March, 1916, now move the court to permit them to file an amended motion for a new trial, in lieu of their original motion; and

Whereas, the amended motion as well as the original motion are within the time prescribed by law, it is now ordered that the plaintiffs may today file an amended motion for a new trial in this case.

Recorded in Vol. 1, page 434 of the Minutes of the District Court of Harris Co., Texas, for the 80th Judicial District.

101 *Amended Motion for New Trial.*

Filed March 30th, 1916.

In the District Court of Harris County, Texas, 80th Judicial District.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of International & Great Northern Railway Co., et al.

vs.

KARL L. DRUESEDOW, Tax Collector of Harris County, et al.

Amended Motion for a New Trial.

Now come the plaintiffs in this case and with permission of the court file this their amended motion for a new trial and pray that a new trial may be granted them on account of the following errors committed on the trial of this case.

1.

The court erred in overruling demurrer No. 1 in Section I of plaintiffs' supplemental petition.

2.

The court erred in overruling demurrer No. 1 in the second supplemental petition.

3.

The court erred in overruling demurrer No. 1 in Section II of the plaintiffs' first supplemental petition.

4.

The court erred in overruling demurrer No. 1 in plaintiffs' answer to defendants' cross action.

5.

The court erred in finding that the plaintiffs show no equity upon any branch of their case and thereby finding that plaintiffs are not entitled to any injunction or other relief as against the defendants because it was shown upon the trial of this case that the State Tax Board in making their valuation and assessment did not act in good faith and did not act under a volition to bring about the right result or to find the true value of the intangibles of the railway, if

any there were, such finding being contrary to all the evidence in this case, and totally unsupported in the evidence.

102 6.

The court erred in finding that plaintiffs show no equity and in holding that the State Tax Board acted in good faith because it was shown that they did not in finding that the stock of the par value of $4,422,000. of the railway was worth a premium of over eight millions, and was worth $12,934,533, it being completely shown to the State Tax Board that such stock was worth no such premium and that the stock was valueless and such State Tax Board having overlooked such evidence and having found that the road was worth $39,116,033, and it was shown to the court that it was worth no such sum as it had been shown to the State Tax Board before they made their final ruling; and the finding of the Court is contrary to all the evidence.

7.

The court erred in decreeing that the plaintiffs show no equity upon any branch of this case, because it was shown to the Board and the Court that the valuation of the State Tax Board of the Railroad at $39,116,033 was contrary to all evidence, it being shown that the railroad had been foreclosed before this assessment was made and that its property was in course of being sold out and that its income experience would not justify a valuation of over twenty-five million dollars.

8.

The court erred in decreeing that plaintiffs have shown no equity and that the decision of the State Tax Board should stand, because the plaintiffs had shown that the assessment of the State Tax Board was made in contradiction to all of the evidence produced before it and could not have been based upon any evidence.

9.

The court erred in decreeing that the plaintiffs show no equity upon any branch of the case because it was completely shown in the evidence that the assessment of the intangibles if any there were, of the railway at $10,743,223 was assessed upon formulas and principles which no rational mind could follow. The court's finding is against all the evidence herein, as well as against the over-
103 whelming weight of the evidence.

10.

The court erred in ruling that plaintiffs show no equity and in upholding the assessment made by the State Tax Board, because such assessment of alleged intangible values was made upon

formulas adopted by the State Tax Board, which formulas were in effect to take the average gross receipts for four years and multiply the same by eight, and then to divide the result by the amount of the capitalization of the railway, as found by the Board, and to multiply the par of the stock by the quotient, which process had no relation to any true method and no relation or reasonable application to finding the intangibles, but necessarily resulted in a gross exaggeration of the amount of intangibles, if any there were, which is denied, and in gross inequalities as between the different railways to the prejudice of the International & Great Northern Railway and its receivers; all as proved on this trial; whereby the court's finding is in collision with all the evidence.

11.

The court erred in finding that the plaintiffs have shown no equity and that the State Tax Board's assessment of the intangibles of the railway at $10,743,223 should stand, because the same is totally unsupported in the evidence, in that it was shown in the evidence without dispute that such assessment was made without regard to any consideration of net profits, and because such assessment was made upon a consideration of gross income alone, whereby it appears that there was a total error adopted by the Board and a wrong process in the case of the International & Great Northern Railway as well as in the case of a large number of other railroads, whereby the court's finding is unsupported in the evidence, and is contrary to all of the evidence.

12.

The court erred in holding that plaintiffs show no equity and no ground to overturn the assessment made by the State Tax Board,
because it was completely shown in the evidence that the
104 State Tax Board acted upon certain formulas in the case of the International & Great Northern Railway Company and a large number of other railroads, using a system to thereby find the intangibles which formulas were one of the Texas & Pacific applied upon the system by the Board to the railroads, by taking the ratio between average gross receipts of four years of the Texas & Pacific and its capitalization and then by dividing a similar ratio of the International & Great Northern Railway Company and other railroads by the ratio of the Texas & Pacific Railway and multiplying the par of the stock of the International & Great Northern Railway and other railways by this ratio; which process was not known by the Board to be equal to the following process, but was precisely equal to the following process applied to the International & Great Northern Railway and numerous other railways on a system to-wit: to multiply the average gross income of four years of such other railway than the Texas & Pacific by eight, and to divide that result by the aggregate of the capital stock and bonds of the other railway, and then to multiply the product by the quotient, by which

principal wide and outrageous inequalities resulted and the finding of intangibles in huge amounts which did not exist, and whereby in comparison with the Texas & Pacific Railway the average gross income was multiplied by eight and the Texas & Pacific was favored to the extent of eight times the other railways, whereby the court's finding is unsupported in the evidence and is contrary to all of the evidence.

13.

The court erred in decreeing that the plaintiffs show no equity upon any branch of the case and in upholding the finding of the State Tax Board as to the value of the alleged intangibles, because the intangibles were found upon formulas which when applied to other railways grossly favored these railway competitors of the International & Great Northern Railway Company and co-taxpayers, all as shown in the evidence without dispute, whereby the court's finding is unsupported and in contradiction to the evidence.

105 14.

The court erred in finding that the plaintiffs show no equity and in upholding the finding of the State Tax Board as to the value of the alleged intangibles, because such finding was made with a gross discrimination against the International & Great Northern Railway Company upon certain formulas used as to it and numerous other railways on a system, but which formulas were arbitrarily departed from in favor of some railroads, competitors of the International & Great Northern Railway, whereby there were gross discriminations made in their favor upon principles or no principles; all as shown in the evidence without contradiction, whereby the court's judgment is in contradiction to the evidence and totally unsupported therein.

15.

The Court erred in finding the plaintiffs showed no equity and in maintaining the finding of the State Tax Board as to the amount of intangibles, because it was completely proven on this trial that the State Tax Board held a public hearing in Austin on June 8th, 1915, at which the plaintiffs here appeared and introduced evidence which was uncontradicted, showing that no intangibles existed and that the proposed assessment which the Board affirmed was erroneous. All as the court was moved to find in Sect's 4 and 5 of II of the Motion for findings of fact.

16.

The court erred in finding that plaintiffs showed no equity and in maintaining the assessment of the intangibles of the I. & G. N. Railway Company at $10,743,223.00 as found by the State Tax Board, because said finding is entirely unsupported in the evidence,

in that neither this court nor the State Tax Board has any basis for such finding, such finding being absolutely against all of the evidence both upon the hearing before the State Tax Board on June 8th, 1915, and on this trial.

17.

106 The court erred in finding that plaintiffs showed no equity and in upholding the assessment of the State Tax Board of the intangibles of the I. & G. N. Railway Company at $10,743,223.00, because said finding was contrary and is contrary to all of the evidence for the following reasons:

(2) It was shown that the Board had used the formulas plead in this case in making their finding, and that such formulas had no relation to a true result and necessarily produced a wrong result.

(*b*) That the Railroad Commission's valuation of the properties was $32,471,027.05, and that the Commission gave no value to intangibles but that this was a valuation of physicals. In addition, it was shown that betterments had been made up to January 1st, 1915, costing $1,542,065.02, which when added to the Railroad Commission's valuation made a total of $34,013,092.07;

(*c*) It was shown to the Board at said hearing and proven in this court that the railway had been placed in the hands of receivers on August 10th, 1914, and a decree of foreclosure entered against it on May 27th, 1915;

(*d*) It was shown that the year 1912 had been the banner year in the history of the properties and that the income for that year would capitalize less than $30,000,000.00 at 7 per cent and that for the year 1915 the income would capitalize less than $17,000,000.00 at 7 per cent, and that for the year 1914, the net income would capitalize less than $1,000,000.00 at 7 per cent;

(*e*) It was proven to the State Tax Board and to the Court on this trial that the total lien indebtedness and stocks of the railway on January 1st, 1915, was over $32,000,000.00 and short of the Railroad Commission's valuation of physicals;

(*f*) It was proven to the Board and to the Court on this trial that in the foreclosure and sale of the properties in 1911 the capital stock of $10,000,000.00 and over $8,000,000.00 of indebtedness had been wiped out by the enforcement of prior obligations. All of the evidence before the State Tax Board was uncontradicted, all as set out in Sec. 5 of II of the Motion for findings of fact.

107 18.

The court erred in decreeing that the plaintiffs had shown no equity and in sustaining the assessment made by the State Tax Board, because it was shown without contradiction that the Board did not act in good faith in that it refused to state at the hearing in

Austin on June 8th, 1915, on what bases it acted, if any, outside of said formulas. All as set out in sections 7 and 8 of II of the Motion for finding of facts.

19.

The court erred in finding that the plaintiffs had shown no equity and so decreeing, and in upholding the assessment made by the State Tax Board of intangibles at $10,743,223 00, because said decree of the court and holding that said assessment was fairly made and in accordance with law is contrary to all the evidence in this case and has no support in the evidence because:

(*a*) It was proven that the assessment of the State Tax Board was made by using the formulas plead, which have no relation to any right method;

(*b*) Because such formulas are based upon gross income instead of upon net income, and necessarily and absolutely lead to a wrong result;

(*c*) Because the formulas used were founded upon an application of the T. & P. formula, whereby the gross income of each road except the T. & P. was multiplied by 8 and that divided by the total capitalization, and the quotient used to multiply the par of the stock of the particular road, whereby a completely erroneous result was obtained and necessarily obtained, all as has been proved without dispute;

(*d*) Because it was proven that the Board used a system whereby great inequalities were made between the I. & G. N. Railway and other railways by the use of such system, which inequalities were brought about by the application of such formulas when applied;

(*e*) Because it was completely proven that other great and
108 arbitrary differences were made against the plaintiffs in favor of other railroads by arbitrary variations from the formulas, the formulas also bringing about great and wide variations;

(*f*) Because the Board acted contrary to all the evidence, as is completely proved without dispute in this case;

(*g*) Because it was completely shown in this case that the Board's valuation of the railroad was grossly excessive of its total true value, and was grossly excessive of the Railroad Commission's valuations as well as the valuation proved to this court on an income experienced basis which would not exceed $25,000,000.00;

(*h*) Because it was proved that the stock of the I. & G. N. Railway had no value, having been foreclosed, and that the railway was unable to comply with its obligations and large liabilities and was in the hands of receivers, whereas the Board placed a value upon it of $12,934,533.00; and because this court in upholding said assessment finds that the value of the stock is as found by said Board, whereas, all of the evidence in this case shows that it is of no value or of ex-

ceedingly small value, if of any, whereas the Board placed a value upon it, including a premium of over $8,000,00-.00 which this court now affirms, it also being shown to this court that proof was made before the Board that this stock had no such value; and it being overwhelmingly shown on the trial and without dispute that this stock has no value and had no value when assessed. All of the matters set out in section- *a-b* inclusive were shown without contradiction in the evidence.

20.

The court erred in finding that the plaintiffs had shown no equity to any relief, and in upholding the assessment of the State Tax Board to the effect that the intangibles of the Railway were assessed at $10,743,223, because such finding is contrary to all the evidence in this case in that it was proved on this trial that the Board found such intangibles using the formulas plead and that such formulas were totally misleading and made upon wrong principles and necessarily resulted in reaching a wrong result; and had no relation to a right result.

109

21.

The court erred in finding that the plaintiffs had shown no equity and in maintaining the assessment made by the State Tax Board, because such finding was absolutely contrary to all the evidence in this: It was proved on this trial that the Board made its finding without taking in consideration the net income of the properties and of the railway, and that this net income for fourteen years back of June 30, 1914, would average only .04636 per cent on the Railroad Commission's valuation and would capitalize at 6 per cent less than $25,000,000.00, this court having found that the railway was intending to make six per cent upon its properties on investment, and the proof being complete and undisputed thereof as well as of the fact that the properties had been well managed. All as requested to be found in sections 12, 13, 21 and 22 of the II of the motion for finding of facts.

22.

The court erred in finding that the plaintiff had shown no equity for relief and in upholding the assessment of the State Tax Board, because this finding was contrary to the evidence, and its overwhelming weight in this case; it being proved that the Board had considered the term "intangibles" to be an "arbitrary" term, and had included in the assessment of intangibles at $10,743,223.00 some amount of tangibles on account of the supposed too low local assessment or local omission of the same from taxation. All as requested to be found in sect. 14 of II of the motion for finding of facts.

23.

The court erred in holding that the plaintiffs had shown no equity and in sustaining the assessment made of intangibles by the State

Tax Board, because such holding was contrary to all the evidence and in absolute conflict therewith in that it was proved without dispute that the Board in applying its formulas made wide variations as between different railroads, which variations were made on the system of the formulas leading to tremendous differences in the finding of intangibles to the gross prejudice of the plaintiffs. All as requested to be found in sections 15 and 17 of II of the motion for finding of facts.

24.

The court erred in finding that the plaintiffs had shown no equity and in maintaining the assessment and formulas made by the State Tax Board, because it was absolutely shown without contradiction that the calculations of the formulas were based upon gross income and not net income. All as requested to be found in sections 18 of II of the motion for the finding of facts.

24-*a*.

The court erred in refusing to find that the formulas used by the Board in making its assessments, had no relation to the right determination of the amounts of the intangibles, and presented no bases therefor, as requested in the 19th section of II of the motion for finding of facts.

25.

The court erred in decreeing that the plaintiffs had shown no equity and in maintaining the assessment made by the State Tax Board, because the same was contrary to the evidence in this and in complete conflict with the evidence in that it was shown without contradiction that the Railroad Commission's valuation of the properties up to January 1st, 1915, was $32,471,027.05 plus additions not valued by the Railroad Commission to that date so as to make a total of $34,130,092.07, not including any intangibles which the Railroad Commission refused to value, and in that the State Tax Board allowed a deduction of physicals of only $28,372,810.00 in complete contradiction to the evidence before the State Tax Board and in this case.

26.

The court erred in upholding the assessment made by the State Tax Board and in finding that the plaintiffs had shown no equity in complete contradiction to the evidence in that it was shown without contradiction that not less than 6 per cent would be a reasonable capitalization of the properties, and that they should yield an income of 6 per cent, and in that it was shown that capitalizating the average income of the properties for fourteen years at that rate the total value could not be over $25,000,000.00 and could not be under any circumstances $39,116,033.00, and in that it was shown in this connection that the evidence had been put

before the State Tax Board as to the experience and value of the road upon an income basis and that that Board had refused to value it upon an income basis, all as requested to be found in sections 21, 22, 23 and 5 of the II of the motion for findings of facts.

27.

The court erred in upholding the assessment made by the State Tax Board and in holding that the plaintiffs had shown no equity to abate the same, in that it was shown without contradiction in the evidence in complete contradiction to the Court's finding that the total lien indebtedness against the properties on January 1st, 1915, was $27,332,000.00, and the total indebtedness adding non-lien debts prior to the stock on that date was $30,574,470.00 whereby the judgment of the court is completely against the evidence and unsupported in the evidence in supporting the State Tax Board in its finding that the stock of the I. & G. N. Railway was worth $12,934,533.00 and in holding that such finding was made in good faith and on right principles, and in holding that it was possible for such finding to be so made; it being shown that the properties were well managed and that their income at 6% over 14 years back would capitalize less than $25,000,000.00, all as set forth in sections 21, 22, 23 and 24 of II of the motion for finding of facts.

28.

The court erred in upholding the assessment made and in finding that there was no error in the same, and that the plaintiffs had shown no equity for relief, in that such holding is in complete conflict with the evidence and entirely unsupported by the evidence, it being shown that on May 7th, 1915, a decree of foreclosure had been entered against the properties of the railroad for the principal amount of $12,908,461.06 with interest from date at six per cent per annum ahead of the stock subject to the other lien debts, and that
112 a receivership was running on the properties, whereby it was completely shown to the court that the stock could not be worth $12,934,533.00 as found by the State Tax Board, all as set out in Sec. 26 of II of the motion for finding of facts.

29.

The court erred in decreeing that the plaintiffs had shown no equity and in upholding the assessment of the State Tax Board, because such finding was contrary to all the evidence in this case, it being proved without dispute that the value of the stock of the Railway as found by the State Tax Board to be $12,934,533.00 was untrue, the stock being valueless and of no appreciable value, as shown to the State Tax Board and completely proved to this court, and it being completely shown to this court that the State Tax Board did not act in good faith in making such assessment. All as set forth in Sections 28 and 29 of II of the motion for findings of fact.

30.

The court erred in decreeing that the plaintiffs had shown no equity and in upholding the assessment of the State Tax Board, because such assessment was shown to be grossly excessive and contrary to all possible or conceivable methods to be pursued by a rational mind acting in good faith, the Board having found that the total value of the properties was $39,116,033.00 and the value of the stock of the foreclosed corporation $12,934,533.00 at a premium of $8,112,533.00, all of these matters were completely disproved in the evidence, and the finding of this court is in complete and absolute conflict therewith and entirely unsupported in the evidence. All as requested to be found in Section 29 of II of the motion for findings of fact.

31.

The court after maintaining the assessment of the State Tax Board further erred against all the evidence in this case in maintaining that assessment for Harris county, because it was shown without contradiction in the evidence that the intangibles of a large number of corporations and businesses in Harris county, Texas, were
113 systematically omitted from any assessment and that no attempt whatever was made to assess the same or collect taxes thereon, as request to be found in Sec. 5 of III of the motion for findings of fact.

32.

The court erred in that having maintained the assessment of the State Tax Board and in that having refused to restrain the collection of any taxes thereon on the ground that the intangibles and loans and moneys were not taxed except of railroads, that it raised the taxation of tangibles of the I. & G. N. Railway and the amount thereof so as to equalize any abatement on intangibles; although it was proved in the evidence that the tangibles of other railroads had been assessed on an equality with those of the I. & G. N. Railway, whereby the tangibles of the I. & G. N. Railway are raised above the level of those of other railways and because it was proved that no intangibles of taxpayers, other than railroads and banks had been assessed in the county, and that no money and cash values had been assessed in the county; and that livestock had been assessed in the county at not over 8/30 of value; and although it was shown without dispute in the evidence that large amounts of property were systematically and purposely not assessed at all, whereby the action of the court was contrary to all the evidence in the case; all as requested to be found in sections 4 and 5 of III of the motion for findings of fact.

33.

The court erred in his 1st conclusion of fact in finding that the State Tax Board acted in good faith and that no sufficient evidence

has been offered to show that the valuations were brought about by bad faith or fraud, and in holding that the valuations reflect the best and honest judgment of the Board as to what the valuations should be, and the court erred in his first conclusion of law in holding that the evidence is insufficient to impeach the valuations made by the State Tax Board:

(*a*) Because it was indisputably shown in this case that the assessment was made upon wrong principles and by the use of a formula which is absurd and which brought about great
114 inequalities, and which has no relation to a right result but necessarily brought about wrong results.

(*b*) Because it was shown that the Board had valued the stock of the insolvent corporation against all the evidence and a wrong and mistaken principle at an excess of over $8,000,000 above par, and at $12,934,533, the par of the stock being $4,822,000 and the corporation insolvent.

(*c*) Because it was shown without contradiction in the evidence that the valuation was grossly excessive and one which no rational mind working on the right principles could make.

(*d*) Because it was shown in the evidence that there had been great inequalities as between the different railroads and as against the I. & G. N. Railway.

(*e*) Because it was shown in the evidence that the Board did not take into consideration net income, but based their erroneous formulas upon gross income.

(*f*) Because it was shown in the evidence that if the income of the property were capitalized at six per cent, the properties could not be worth over twenty-five million dollars, whereas, the Board valued them at $39,116,033.

(*g*) Because under the principles stated it is of no importance whether or not the Board had an intent to do a wrong or injury or permit a fraud.

(*h*) Because all the evidence in this case indisputably shows and the overwhelming weight of the evidence shows all of the matters assigned above, under the letters *a*, *b*, *c*, *d*, *e*, and *f*, and because the court has refused to give any effect to these matters.

34.

The court erred in his first conclusion of fact and his first conclusion of law wherein he rules that no bad faith or fraud was shown in the action of the Board in making this assessment, and that their action involves their best judgment, because it was shown in this case that the Board acted against all the evidence in making a grossly excessive assessment of properties which did not exist at all,
115 or in the extent claimed, upon wrong formulas and upon wrong principles, the evidence being undisputed and over-

whelmingly showing this, whereby it becomes unimportant whether the Board intended to injure.

35.

The court erred in his first conclusion of fact and first conclusion of law in finding that the State Tax Board in making the assessment complained of was not shown to have acted fraudulently, because it is immaterial whether they acted with an intent to defraud, when it was indisputably shown in the evidence and by all the evidence, and by the overwhelming weight of the evidence, that the Board had valued the properties by formulas in making the valuations which formulas were conclusively shown to involve wrong principles and necessarily to lead to wrong results, whereby it becomes unimportant to determine whether or not the Board was guilty of fraud or purpose to injure.

36.

The court erred in his first conclusion of fact and first conclusion of law, wherein he found that the State Tax Board in making the assessment complained of was not guilty of fraud or bad faith, because all the evidence in this case absolutely showing without contradiction, as well as by its overwhelming weight that the Board had assessed property by said formulas of a large number of railroads and that its formulas had worked unevenly with gross discrimination against the I. & G. N. Railway Company. The plaintiffs are entitled to relief although the Board may not have intended to injure.

37.

The court erred in his first conclusion of fact and his first conclusion of law wherein he found that the Board had not acted in fraud or bad faith and supported his judgment on that ground, because it was indisputably shown in this case that the I. & G. N. Railway properties were not worth $39,116,033, as found by the Board, and that the Board had worked its formulas and applied them upon the basis of gross income, and upon the basis of multiplying the average gross income for four years by 8, and dividing that
116 result by the total capitalization and multiplying the stock by the quotient without knowing that it was so doing, thereby accomplishing enormous and gross discriminations and working a result having no relation to the real problem; all of which was indisputably shown in the evidence and shown by the overwhelming weight of the evidence, whereby the plaintiffs are entitled to relief, although the defendants may not have intended to injure.

38.

The court erred in his second and third conclusions of fact and in his second conclusion of law and in his judgment in adopting the Railroad Commission valuation of physicals with certain addi-

tions made by him thereto, on the basis of supposed present market value for purposes other than railroad purposes, because the right basis is the value of property for railroad purposes in the use of the railroad, on a net income basis.

39.

The court erred in his second and third conclusions of fact and his second conclusion of law and in denying all relief to the plaintiffs in that he has not abated anything in the valuation of intangibles made by the State Tax Board by that Board deducting the physical value as stated by them of $28,372,810 from $39,116,033 whereby there remained $10,743,223 as intangibles, which the evidence shows has been distributed for taxation to Harris and other counties and is involved in this suit, whereby by his findings and the applications thereof the court raised the amount of physicals for taxation without making any corresponsing deduction of the amount of the intangibles, thereby approving the taxation of the same to a double extent and bringing about such double taxation, all in violation of the equal protection of the law and in due process thereof as presented by section 1 of Art. XIV of the Constitution of the United States and also by the Constitution of Texas, whereby a Federal question is raised.

117 40.

The court erred in his third conclusion of fact and his second conclusion of law and in the judgment herein, refusing to give plaintiffs any relief, wherein he values property in Houston (correctly found to be reasonably calculated for railroad purposes and reasonably held therefor) on the basis of its supposed market value for other purposes; thereby refusing to value the property at its value for railroad purposes by taking into consideration the net income of the railroad.

41.

The court erred in his third conclusion of fact wherein he held that the rolling stock and physical properties in Harris county had been taxed in 1915 on the valuation of $1,606,105, the evidence showing absolutely and without controversy that it had been valued at more than said sum.

42.

The court erred in the third conclusion of fact wherein he found that the valuations placed by the Railroad Commission of Texas on the properties in Harris county aggregated $2,009,822 and including rolling stock apportioned to Harris county, $2,331,822 there being no evidence whatever to support this conclusion of fact.

43.

The court erred in the third conclusion of fact wherein he found that additions and betterments made in Harris county, above the Railroad Commission valuation, aggregating $400,000 because there was no evidence whatever to show that such additions and betterments to any such cost or value had been made, existing January 1st, 1915.

44.

The court erred in his third conclusion of fact wherein he found that certain real estate in Harris county, *pore* certain values for market purposes over and above the Railroad Commission's valuations, because there was no evidence whatsoever to support any such conclusion and a total absence thereof.

118

45.

The court erred in his third conclusion of fact wherein he stated that the tangibles of the plaintiffs were valued in Harris county at about 34 per cent of their value and including intangibles as apportioned by the State Tax Board at about 40 per cent of their value, because such finding is absolutely unsupported in the evidence.

46.

The court erred in his second conclusion of law, so called, wherein he found that other property of other persons in Harris county *were* assessed at least fifty per cent of *their* true values; the evidence conclusively showing in this case that real estate was assessed at not over 46 per cent of its true value; that cattle were not assessed at over 8/30 of their true value, and that intangibles in Harris county other than those of railroads and perhaps of banks were not assessed at all, and that loans and money were not assessed at all, and that all of this was done upon a system.

47.

The court erred in his first conclusion of fact and in his first conclusion of law wherein he found that the evidence did not show that the State Tax Board had acted in bad faith or in legal fraud, because it was conclusively shown in the evidence and by the overwhelming weight of the evidence that they did so act.

48.

The court erred in his first conclusion of fact and his first conclusion of law wherein he found that the State Tax Board in making the assessment herein complained of, whereby they assessed the insolvent I. & G. N. Railway Company at $39,116,033, and its sup-

posed intangibles at $10,743,223 and the par of its stock at to-wit: $12,934,533 did not act in bad faith and was not chargeable with fraud and wherein his decree found that the plaintiffs had shown no equity and affirmed the assessment, because the following matters were indisputably shown, and were shown by the over-
119 whelming weight of the evidence, to-wit:

(*a*) The State Tax Board used formulas in making the assessment of the I. & G. N. Railway and the other railroads, which formulas were irrational and such as no rational mind could follow.

(*b*) In these formulas the Board involved only gross income and they did not consider in or out of the formulas net income.

(*c*) In these formulas the Board in effect (except as to the T. & P.) multiplied the average gross income of the roads by 8, divided the product by the total capitalization, and then multiplied the stock by the quotient so obtained.

(*d*) The results obtained were unequal between the different railroads and of such a character as to the I. & G. N. Railway and other railways as to show gross discriminations against the railways and I. & G. N. Railway, and such processes as are only explainable upon the theory of a purpose not to reach a right result, assuming that they were used by normal minds.

(*e*) The board acted against all the evidence in this case and all of the evidence put before it, and refused to state upon what bases they acted other than the formulas.

(*f*) It was completely shown to the Board that the I. & G. N. Railway Company had no intangibles, or if they had any, they were very small and neither in extent nor value approaching the values placed upon them by the Board, and that the properties of the railway had been foreclosed, and that the net income of the railway justified no such valuations but would justify a valuation at less than the Railroad Commission valuation of the physicals, but the Board disregarded all of this evidence and put the stock at a premium of over eight million dollars and the value of the property at $39,116,033, whereby they necessarily placed the stock of this foreclosed property at $12,934,533 when it was shown that the stock was valueless or practically valueless.

Whereby it appears upon all of the evidence in this case, and conclusively, and was indisputable shown that the Board if acting with normal minds, did not try to find the true extent and
120 value of any intangibles, but did try to find an arbitrary and grossly excessive extent and value thereof, if any existed, which is denied, and whereby it conclusively appears that if they did not act with normal minds, nevertheless they acted illegally and contrary to law, and not by due process of law; and that the Board refused to extend to plaintiffs the equal protection of the law. Wherefore the plaintiffs invoke the Constitution of the State of Texas, and Art. 1, Section 1 of the XIV Amendment of the Con-

stitution of the United States, and represent that if such assessment stood, the property of the Railway Company will be taken without due process of law, and divested from the persons entitled thereto by illegal taxation, and by reason of the failure of the Tax Board to follow due process of law, and that taxes will be levied and collected out of the other property of the railway in violation of due process of law and of the equal protection of the law. Whereby a Federal question is presented.

49.

The court erred in holding that the Chapter 4 of the Title "Taxation" in R. S. of the State of Texas, is constitutional and in refusing to find it unconstitutional as requested by the second conclusion of law refused.

50.

The court erred in refusing to find that Chapter 4, Title 126 of the R. S. of Texas, is unconstitutional, because it lodges in the State Tax Board power to make assessments in conflict with Sections 8, 11 and 14 of Article 8 of the Constitution of the State of Texas, and other provisions of that Constitution, in providing for local assessments of such property, all as requested in the 3rd conclusion of law refused.

51.

The court erred in holding that Chapter 4 of the Title 126 of the Revised Statutes of Texas under which the State Tax Board acted, is not unconstitutional and void, and in conflict with Section 1 of Article 14 of the Amendments to the Constitution of the United States, as requested to be found by the 4th Section in the
121 Conclusions of Law requested.

52.

The court erred in refusing to find that Chapter 4 of Title 126 of the Revised Statutes of Texas under which the State Tax Board acted, is unconstitutional and void, as requested in the 5th Conclusion of Law which the court was moved to find.

53.

The court erred in refusing to find that Chapter 4, Art. 7414, Title 126 of the Revised Statutes of Texas is unconstitutional wherein it attempts to provide for a double general ad valorem taxation, or to make the same possible, as the court was requested to find in Section 6 of the motion for findings of law.

54.

The court erred in refusing to find that Chapter 4 of Title 126 of the Revised Statutes of Texas, and Section 7414 thereof are unconstitutional, because they except from the operation of the statute numerous individuals and corporations, and make it applicable to a limited number of subjects, not legally to be so classified, and is thereby in conflict with the Constitution of the State of Texas and Section 1 of the Fourteenth Amendment to the Constitution of the United States, as set forth in Section 7 of the motion for findings of law.

55.

The court erred in refusing to find that tangibles must be assessed locally, and that they cannot be assessed under the term of intangibles and distributed on mileage basis for taxation outside of counties in which they lie, as requested in Section 8 of the motion for conclusions of law.

56.

The court erred in refusing to find that the Constitution of the State of Texas and the laws of Texas required that all properties taxed on the ad valorem principle shall be taxed upon a uniform and equal basis of valuation, and that no property should be omitted as requested in Section 9 of the Motion for conclusions of law.

122

57.

The court erred in refusing to find, that under the facts of this case, the right way to value the aggregate of tangibles and intangibles would be by valuing the same for railroad purposes, upon the basis of the net income of the properties, over the experience of a reasonable number of years, and at a reasonable rate of interest, as requested in Section 10 of the motion for conclusions of law.

58.

The court erred in refusing to find that when an assessing authority uses a wrong principle in estimating value or arriving at the quantity of the thing assessed, the assessment should be set aside, as requested in the 11th and 12th Sections of the motion for conclusions of law.

59.

The court erred in refusing to find that when the assessing authorities assess a thing not owned by the taxpayer or assess it to an extent to which he does not own it, that the assessment should be abated as requested in the 13th section of the motion for conclusions of law.

60.

The court erred in refusing to find that when an assessing authority acts with gross error, then the assessment should be set aside, at least when the error is so gross as to shock all sense of equity, as requested in Section 14 of the motion for conclusions of law.

61.

The court erred in refusing to find that when an assessing authority acts upon a wrong volition, and purposely makes a wrong assessment, the assessment should be set aside, and also that it should be set aside, though there be no intent to injure; when made on wrong or illegal principles, as requested in the 15th Section of motion for conclusions of law.

123

62.

The court erred in refusing to find that no assessment can be supported which is the result of application of theories or principles, or based upon actions which no rational mind could follow, or approve, as requested in the 16th section of motion for conclusions of law.

63.

The court erred in refusing to find that no assessment can be supported which is made in contradiction to all of the evidence, as requested in section 16-*a* of motion for conclusions of law.

64.

The court erred in refusing to find that it is the duty of the assessing party, or person to explain the bases of the assessment, when requested to do so, at the right time, and legal fraud not to so explain, as requested in section 17 of the motion for conclusions of law.

65.

The court erred in refusing to find that an assessment will not be supported when recklessly made, or in contradiction to all evidence, as requested in section 18 of the motion for conclusions of law.

66.

The court erred in refusing to apply the above stated principles in regard to making this assessment, to the facts indisputably proven in this case, and shown by the overwhelming weight of evidence in this case, as applied in Section 19 of the motion for conclusions of law, thereby denying to plaintiffs due process of law, and the equal protection of the law in violation of section one of the 14th Amendment to the Constitution of the United States, and in violation of the Consitution of Texas.

67.

The court erred in refusing to find that when a standard and practice of valuation of property in a county for taxation is below its value, the owners of other property have a right to a reduc-
124 tion in taxation proportionably, as requested in section 20 of the motion for conclusions of law.

68.

The court erred in refusing to find that when tangibles are on a system assessed below their true value in a county, the assessed intangibles should bear a corresponding reduction to their valuation and taxation, subject, however, to an adjustment by bringing up the assessment of tangibles, if they are assessed below the general average, provided that this equalization should not be made when it would involve a dislocation from the proportions of the assessment made of properties of the same character or above the system of assessments made of other property, as requested in section 21 of Motion for conclusions of law.

69.

The court erred in refusing to find that it would be illegal under the facts of this case, to raise the assessment of the intangibles of the International & Great Northern Railway, above the rate of assessment at which they are assessed along with ten other railways in Harris county, and that it would also be illegal to make such raise of valuation; without taking into consideration the rates at which property, other than real estate, is assessed, all as requested in section 22 of motion for conclusions of law. The court in so doing denying to the plaintiffs the equal protection of the law, and due process of the law, and the court raising the assessment of the physicals of this Ry. in Harris county, above the rate of the assessment of other Rys. and above the rate of assessment of other property in that county, and refusing to consider that other property was systematically not assessed at all in violation of the Constitution of Texas, and of section I of the 14th Amendment to the Constitution of the United States.

70.

The court erred in refusing to find that no intangibles, other than those of railroads, or possibly of banks, being attempted to be assessed or taxed in Harris county, but systematically omitted, and that all loans and moneys being systematically omitted from taxation,
125 that the taxation of intangibles of the I. & G. N. Railway in Harris County should not be taxed, all as requested in Sections 23 and 24 of the motion for conclusions of law, and the court erred in holding that they should be taxed, in violation of due process of law and of the usual protection of the law as guaranteed by the Constitution of Texas and Section I of the XIV Amendment to the Constitution of the United States.

71.

The court erred in admitting in evidence in this case the testimony of Kelly and of Parker, over the objections of the plaintiffs, as shown by their bills of exceptions No. — for the purpose of showing that the physical properties of the I. & G. N. Railway Company, to-wit: its yards, tracks, depots and real estate in Harris county, and the cost of reproducing the same would cost certain sums of money based on the values of abutting property, and the cost of reproduction, because the cost of reproduction is not the standard for the valuation, and the court erred in following up said evidence in his third conclusions of fact as to certain real estate therein described.

Wherefore upon all and each of the above grounds the court is moved to grant the plaintiffs a new trial, and to set aside the judgment and findings made by the court herein.

JAS. A. BAKER AND
CECIL A. LYON,
Receivers of the I. & G. N. Ry., and
THE INTERNATIONAL AND GREAT NORTHERN RY.,
Plaintiffs,
By WILSON, DABNEY & KING,
Their Attorneys.

Filed March 30th, 1916.
O. M. DUCLOS,
Clerk District Court, Harris Co., Texas,
By B. J. WITT,
Deputy.

126 *Order Overruling Motion for New Trial.*

Vol. 1, p. 442.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of International & Great Northern Railway Company,

vs.

KARL L. DRUESEDOW, Tax Collector, Harris County, et al.

March 31, 1916. Whereas, on March 30th, 1916, within two days after the judgment of the court and the court's announcement of the same, the plaintiffs filed a motion for a new trial and also on the same day with the permission of the court, under order duly given, an amended motion for new trial;

And whereas, this day such amended motion for new trial came on for consideration by the court;

And whereas, the court is of opinion that the same should be overruled,

It is now adjudged and decreed that said amended motion for new trial be in all things overruled, to which ruling of the court the defendants did then and there in open court except as to the court's overruling each section of the motion and all of the motion, which exception are now noted of record;

And whereas, the plaintiff did then and there in open court give notice of appeal to the Court of Civil Appeals of the First Supreme Judicial District, sitting at Galveston, Texas, which notice of appeal is accordingly now noted of record.

And whereas, the plaintiffs did then move the court that they might have thirty (30) days after the adjournment of this court in which to prepare and cause to be prepared and filed a statement of facts and bills of exceptions;

Now, therefore, it is ordered and adjudged that the plaintaiffs do have thirty (30) days from and after the adjournment of this court to prepare or cause to be prepared and filed a statement of facts and bills of exceptions, in this case. Recorded in Vol. 1, page 442 of the Minutes of the District Court of Harris county, Texas, for the 80th Judicial District.

127 *Order Extending Time.*

Vol. 1, p. 446.

No. 68800.

JAS. A. BAKER & CECIL A. LYON, Receivers I. & G. N. Ry. Co.

vs.

KARL L. DRUESEDOW, Tax Collector, Harris County, Texas, et al.

Whereas, the plaintiffs have appealed the above styled case, in which a judgment has been entered in this court in favor of the defendants, and on the cross action against plaintiffs; and whereas, notice of appeal was duly given and thirty days after the day of adjournment was given by statute, and as provided in the order of this court, for the filing of statement of facts and bills of exceptions herein;

And whereas, good cause has been shown to the court for the extension of this time on account of the inability of the stenographer of this court to prepare the transcript of the evidence, which is now adjudged to be good cause;

Now, therefore, it is ordered that the time in which to file statement of facts and bills of exceptions herein is now, on the motion of the plaintiffs, extended for thirty days from and after the expiration of the first thirty days hereinbefore allowed, within which additional

time, the statement of facts and bills of exceptions shall be prepared and filed.

This order is made in vacation this the 22nd day of April, A. D. 1916, and the Clerk is directed to enter the same. Recorded in Vol. 1, page 446 of the Minutes of the District Court of Harris Co. Texas, for the 80th Judicial District.

Order Extending Time.

Vol. 1, p. 502.

JAS. A. BAKER & CECIL A. LYON, Receivers of I. & G. N. Ry. Co. et al.

vs.

KARL L. DRUESEDOW, Tax Collector, Harris County, Texas, et al.

May 24, 1916. Whereas, on March 31st, 1916, in the order overruling motion for new trial in this case filed by plaintiffs and reciting that the plaintiffs had given notice of appeal, this court ordered that the plaintiff should have thirty days from and after the
128 adjournment of the court to prepare and cause to be prepared and filed a statement of facts and bills of exceptions herein, the court adjourning on April 1st, 1916, and whereas, upon good cause shown this court, on April 22, 1916, made an order extending the time for the filing of the statement of facts and bills of exceptions for thirty days from and after the expiration of the first thirty days allowed; and whereas, the plaintiffs now in open court, during the term of this court in Harris county apply to the court for a further extension of time within which to prepare and file a statement of facts and bills of exceptions, and in support of the application have shown good cause for the further extension of such time to-wit: the fact that the stenographer of this court has constantly been employed in court and has just completed her transcript of the evidence and has been unable to complete the same before, whereby it appears to the court to have been impossible and to be impossible to prepare the statement of facts and bills of exceptions within the time which has been allowed, and it further appearing to the court that plaintiffs' counsel have shown due and complete diligence in this matter and have substantially kept up with the court stenographer in her work and in their preparation of the proposed statement of facts;

It is therefore, now in open court ordered and decreed that the previous orders allowing additional time, hereinabove recited, be in all things confirmed, and that the plaintiffs and appellants are now allowed up to June 25, 1916, to prepare and cause to be prepared and settled and filed a statement of facts and their bills of exceptions in this case, and that the defendants and appellees be also allowed the same time to prepare and cause to be prepared and settled and filed their bills of exceptions herein. Recorded in Vol. 1, page 502 of the Minutes of the District Court of Harris county, Texas, for the 80th Judicial District.

129 *Plaintiffs' Bill of Exception No. A.*

Filed June 14th, 1916.

In the District Court of Harris County, Texas, 80th Judicial District.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers I. & G. N. Railway Company,

vs.

KARL L. DRUESEDOW, Tax Collector, Harris County, et al.

Be it remembered that upon the trial of the above styled case defendants offered in evidence a certain communication from Thomas J. Freeman, Receiver and General Manager of the sold out I. & G. N. Railroad, addressed to the Railroad Commission of Texas, and dated May 5, 1911, to the introduction of which the plaintiffs objected that the Railroad Commission had not adopted the statements therein but valued the property at about 30 millions at that time; that the document was irrelevant and immaterial, because made by the Receiver of the sold out railroad before the road had been sold out, it appearing in evidence that the road was sold out in June and the sale confirmed in September, 1911, and because Judge Freeman's authority to make the statements is not shown and because they were mere unsworn statements and exparte and contradicted by the course and history of the railroad and its subsequent history; because they were merely unsworn arguments, not shown to be authorized and because it is not shown on what authority they were made. Which objections were considered by the court and overruled; whereupon the plaintiffs in open court excepted and over the same this document was introduced in evidence, being set out in the statement of facts herewith, pages 247-249 which is now referred to and made a part of this bill.

Wherefore, the plaintiffs present this their bill of exceptions No. A, and pray that it be allowed.

WILSON, DABNEY & KING,
Attorneys for Plaintiffs.

The foregoing bill of exceptions No. A was presented to me this 14th day of June, 1916, and is by me in all things approved and ordered to be filed.

J. W. HARVEY,
Judge.

130 Filed June 14th, 1916, O. M. Duclos, Clerk District Court, Harris Co., Texas, by B. J. Witt, Deputy.

Plaintiffs' Bill of Exception No. B.

Filed June 14th, 1916.

District Court of Harris County, Texas, 80th Judicial District.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers I. & G. N. Railway Company,

vs.

KARL L. DRUESEDOW, Tax Collector, Harris County, Texas.

Be it remembered that upon the trial of this case the defendants offered in evidence a certain table verified by the witness Holder, Land & Tax Commissioner of the plaintiffs, which table showed the renditions and assessments of physical properties in the various counties penetrated by the I. & G. N. Railway as made in 1915, excluding rolling stock, and such table being offered in evidence the plaintiffs objected thereto that it was immaterial and irrelevant and offered on the wrong theory and in support of the theory that the State Tax Board had a right to take up and assess in the form of intangibles properties in whole or in part assessed at a low rate or too low a rate in the different counties, and so to make assessments of tangibles required under the law and constitution to be assessed locally under the guise of intangibles. Which objection having been considered by the court were overruled. Whereupon the plaintiffs in open court excepted and over their objections and exceptions this table was introduced in evidence together with the testimony of the witness Holder as to the total of such table and explanation thereof, all as appears on page 293 of the statement of facts made a part of this bill.

Wherefore, the plaintiffs present this their bill of exceptions No. B, and pray that it be allowed.

WILSON, DABNEY & KING,
Attorneys for Plaintiffs.

The foregoing bill of exceptions No. B was presented to me this 14th day of June, 1916, and is by me in all things approved, and ordered to be filed.

J. D. HARVEY,
Judge.

131 Filed June 14th, 1916, O. M. Duclos, Clerk District Court, Harris Co., Texas, by B. J. Witt, Deputy.

Bill of Exception No. C, by Plaintiffs.

Filed June 14th, 1916.

In the District Court of Harris County, Texas, 80th Judicial District.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of International and Great Northern Railway Co.,

vs.

KARL L. DRUESEDOW, Tax Collector of Harris County, Texas, et al.

Be it remembered that upon the trial of this case the witness, H. G. Lidstone, was recalled by the defendants and examined by them, and stated that he had before him a detailed map used for the purpose of arriving at property values by acreage, and which map is described in his testimony as set out on page 368 of the statement of facts made a part of this bill; whereupon the defendants offered this map in evidence, it showing statements of value thereon; to the introduction of which map the plaintiffs objected that it was irrelevant and immaterial, and that the true value of abutting property is not the test of the value of a railroad, but that the test of the value of a railroad is of it as an income producing property, and that the test of the value of its property is what it is worth for railroad business, and these objections having been considered by the court were overruled; whereupon the plaintiffs in open court excepted to the action of the court, and over this exception and these objections the map was introduced in evidence, being Exhibit 24 in the roll of maps made a part of the statement of facts.

Wherefore the plaintiffs present this their bill of exception No. C, and pray that it be allowed.

WILSON, DABNEY & KING,
Attorneys for Plaintiffs.

The foregoing bill of exception No. C was presented to me this 14th day of June, 1916, and is by me in all things approved.

J. D. HARVEY,
Judge.

132 Filed June 14th, 1916. O. M. Duclos, Clerk District Court, Harris Co., Texas, by B. J. Witt, Deputy.

Plaintiffs' Bill of Exception No. D.

Filed June 14th, 1916.

In the District Court of Harris County, Texas.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of International & Great Northern Railway Company, et al.

vs.

KARL L. DRUESEDOW, Tax Collector of Harris County, Texas, et al.

Be it remembered that on the trial of this case A. B. Kelly was called as a witness by the defendants, and on their interrogation testified as appears on pages 300, 301, 302, 303 and 304 of the Statement of Facts down to the 8th line from the bottom of page 304.

And be it remembered that at this point the plaintiffs objected to the court as follows: That they had now perceived the course of the interrogation and that they therefore now moved to strike out all of Mr. Kelly's testimony for the following reasons:

That the defendants cannot show the value of the International & Great Northern Railway properties in Houston for the purpose of showing that they are assessed too low by determining the value of abutting properties around it, and then taking the I. & G. N. properties as of the value of abutting properties that this was the theory of the interrogation and the plaintiffs demanded of defendants' counsel whether this was the theory of the interrogation, whereupon he answered: "It occurs to us that it would be a pretty fair way to get at it." To which theory the plaintiffs objected, in addition to their previous objection, that it was entirely misleading, inaccurate, immmaterial and sheds no light on the case, because the railroad is a unity and is unable to sell its properties, but must use them for railroad purposes, and because their values ought to be con-
133 sidered only upon the basis of the value thereof for railroad use.

And furthermore, that if it be considered that the railroad could sell its properties and go out of the railroad business, which it could not do, and if it be considered that it could take up the railroad operation entirely and sell out its land as so much acreage, then that Mr. Kelly's testimony would not apply, because his testimony is given upon these facilities being there. And in this connection the plaintiffs asked Mr. Kelly whether or not a large portion of the values he testified to existed because of the existence of the railroad, and that his testimony would be on a different basis in large part if the railroad was not there, and the witness Kelly said "Yes, sir, that is true."

And the plaintiffs also made the further objection to this testimony, to-wit: That it was inadmissible, even on the defendants'

theory, because it did not appear but that all other railroad properties and physicals had been valued on the same basis as this railroad; wherefore, to now put this railroad on a higher valuation would be to classify it to itself, the presumption being that the assessing authorities had treated all alike.

Wherefore, upon the ground of all of these objections the plaintiffs prayed the court to strike out all of Mr. Kelly's testimony referred to, which motion and objections being considered by the court, were by the court overruled and the defendants then and there excepted and took this their bill of exception No. D, and over this motion and the objections made, this testimony was permitted to stand.

Wherefore, the plaintiffs present this bill of exception No. D and pray that it be approved.

WILSON, DABNEY & KING,
Attorneys for the Plaintiffs.

The foregoing bill of exception No. D was presented to me this 14th day of June, A. D. 1916, and is by me in all things approved, and ordered to be filed.

J. D. HARVEY,
Judge.

Filed June 14th, 1916.
O. M. DUCLOS,
Clerk District Court, Harris Co., Texas,
By B. J. WITT,
Deputy.

134 *Plaintiff's Bill of Exception No. E.*

Filed June 14th, 1916.

In the District Court of Harris County, Texas, 80th Judicial District.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of International & Great Northern Railway Co.,

vs.

KARL L. DRUESEDOW, Tax Collector of Harris County, Texas, et al.

Be it remembered that on the trial of this case A. B. Kelly was called as a witness by the defendants and having qualified himself as a real estate expert was requested to give his opinion as to the value and market values of real estate in possession of or owned by the I. & G. N. Railway Company in Harris County, Texas, the different parcels being pointed out to him on the maps; to all of which questions and to any interrogation in that regard the plaintiffs objected as follows:

That the defendants cannot legally show the value of the I. &

G. N. properties in Houston for the purpose of showing that they are set too low by determining the value of abutting properties around them and then taking the I. & G. N. properties as of the value of abutting properties; that this was the theory of the interrogation, and in this connection the plaintiffs demanded of defendants' counsel whether this was the theory of interrogation. Whereupon he answered that "it occurs to us that it would be a pretty fair way to get at it." To which theory the plaintiffs objected in addition to their previous objections that it was entirely inaccurate, misleading and immaterial, because it sheds no light on the case, because the railway is a unity and is unable to sell its properties but must use them for railroad purposes, and because their value ought to be considered only on the basis of the value thereof for railroad use.

And furthermore the plaintiffs objected that if it be considered that the railroad could sell its properties and go out of railroad business, which it could not do, and that if it be considered that it could take up the railroad operation entirely and sell out its land at so much acreage, then that Mr. Kelly's testimony would not apply because his testimony is given upon the basis of these facilities being there, and because Mr. Kelly did state in this connection upon the question of the plaintiffs that he was basing his estimates on the existence of the railroad and that his testimony would be on a different basis in large part if the railroad were not there, the witness Kelly having so stated as appears in the statement of facts.

135

And the plaintiffs also made the further objection to this testimony that it was inadmissible even on the defendants' theory, because it did not appear but that all other railroad properties and physicals had been valued on the same basis as this railroad; wherefore, to now put this railroad on a higher valuation would be to classify it by itself, the assumption being that the assessing authorities had treated all alike.

And all of these objections being considered by the court were by the court overruled. Whereupon, the plaintiffs then and there in open court excepted and over these objections and the exceptions to the action of the court the witness Kelly was interrogated by the defendants and gave his testimony as set out on pages 305-306 of the statement of facts which is made a part of this bill.

Wherefore the plaintiffs present this bill of exception No. E and pray that it be allowed.

WILSON, DABNEY & KING,
Attorneys for Plaintiffs.

The foregoing bill of exception No. E was presented to me this 14 day of June, 1916, and is by me in all things approved and ordered to be filed.

J. D. HARVEY,
Judge.

Filed June 14th, 1916.
O. M. DUCLOS,
Clerk District Court, Harris Co., Texas.
By B. J. WITT, *Deputy.*

136 *Plaintiffs' Bill of Exception No. F.*

Filed June 14th, 1916.

District Court of Harris County, Texas, 80th Judicial District.

No. 68800.

JAS. A. BAKER & CECIL A. LYON, Receivers of International & Great Northern Railway Company,

vs.

KARL L. DRUESEDOW, Tax Collector of Harris County, Texas, et al.

Be it remembered that upon the trial of this case R. D. Parker was called by the defendants and it was shown that he is a Civil Engineer, his duties being mainly to appraise railway property under the stock and bond law, and that he was connected with the Railroad Commission of Texas, and that he had made an inspection of the I. & G. N. Railroad properties in Harris county in a larger part by going over the properties, and that he had been over the properties before and in connection with Mr. Parker's examination previous valuations made by the Railroad Commission of these properties or of portions of them were introduced in evidence; and be it further remembered that Mr. Parker stated that he had made an estimate of the reproduction cost of the physical properties of the International & Great Northern Railway Company in Harris county, Texas, excluding rolling stock, and further that he excluded from his estimates any changes or additions for increased values of land, and that he had made up certain sheets showing the cost of the reproduction of the properties at the present time, that is, of the physical properties excluding rolling stock in Harris county, and taking the values as made by the Commission and adding nothing for the increased value of real estate;

Having so testified the defendants offered in evidence this statement showing Mr. Parker's estimate of the reproduction cost on the basis stated and asked him what this reproduction cost was. Whereupon, the plaintiffs objected to such testimony; that the testimony was inadmissible as pursuing the wrong method for determining in relation to a tax suit the taxable value of a railroad, and that the re-

137 production cost was not the proper method and not the method to be followed in this case, and that his testimony would be entirely misleading, inaccurate and immaterial and shed no light, and that the railroad is a unity and the values of the property must be considered on the basis of the value thereof for railroad use and with reference to the experience and income of the property.

Which objections having been considered by the court were all overruled. Whereupon the plaintiffs excepted and over the exceptions and objections of the plaintiffs the witness testified as to what

his estimates were; that the reproduction cost of the various divisions in Harris county would be:

Ft. Worth Division in Harris county	$364,548.19
Gulf Division in Harris county, main line	1,609,793.92
Magnolia Park Line in Harris county	743,181.62
Columbia Tap or Branch, in Harris county	106,690.06

That this estimate was made by estimating the cost of making the physical constructions in Harris county, excluding the rolling stock if made at the present time, and by adding in the Railroad Commission's valuations of real estate heretofore made, without adding anything for any increased value thereof, and that in making this estimate he had included 5% for legal and engineering expenses, 5% for interest during construction and 6% for socalled franchise or overhead expenses, and that deducting real estate valuation there would remain a physical valuation in excess of the real estate valuation of $1,767,519.32.

The reproduction cost for 1915 would be the same practically as at present.

Wherefore, the plaintiffs present this their bill of exception No. F, and pray that it be allowed.

WILSON, DABNEY & KING,
Attorneys for Plaintiffs.

The foregoing bill of exception No. F was presented to me this 14th day of June, 1916, and is by me in all things approved and ordered to be filed.

J. D. HARVEY,
Judge.

Filed June 14th, 1916, O. M. Duclos, Clerk District Court, Harris Co. Texas, by B. J. Witt, Deputy.

138 *Plaintiffs' Bill of Exceptions No. 3.*

Filed Mar. 31st, 1916.

In the District Court, Harris County, Texas, 80th Judicial District.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers International & Great Northern Railway Company, et al.

VS.

KARL L. DRUESEDOW, Tax Collector, Harris County, et al.

Bill of Exceptions No. 3.

Be it remembered that on March 31, 1916, in open court, the plaintiffs presented to the court their motions to find certain conclusions of law and fact therein set forth, in addition to those already

found and filed by the court, said motions having been filed on March 30, 1916, and containing the additional findings of law and fact which the plaintiffs request the court to make. The present term of the court is expected to be adjourned on the evening of the 31st of March and can continue no longer, under the law, than the first day of April, 1916, and on account of the volume of business to be dispatched and attended to by the Judge of the court, he has been and will likely be prevented from examining into the conclusions of law and fact requested by the plaintiffs and to determine their correctness or to determine whether or not it is proper for the court to find any such facts as requested, and the court then and there, on March 30th, when said motions were presented, so stated to counsel for plaintiffs, the court stating to such counsel that as soon as the Judge of the court had time to give attention to the matter, he would do so and would within the proper time, file such additional conclusions of law and fact as he may find to be true and such as may be necessary or required under the law to be filed, and further stating that on account of the business engagements intervening until the adjournment of court, in the judgment of the court it would be impossible for the court to examine the conclusions of fact requested by the plaintiffs and determine their correctness and whether or not it is proper that they should be given by the court as requested, the court further stating to counsel that if, when the engagements of the court al-
139 lowed the judge to do so, and upon further investigation of the evidence, he found it necessary or proper to file additional conclusions of law or fact, that he would file them with the clerk, otherwise not; and thereupon the court, having heard the amended motion for a new trial filed by the plaintiffs and whereupon said amended motion for a new trial was presented to and overruled by the court, and this bill of exception is now granted and ordered to be filed as a part of the record in this case, to which action of the court in overruling such amended motion for a new trial, the plaintiffs excepted in open court, and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District, sitting at Galveston, Texas.

The plaintiffs also then and there, in open court, excepted to the non-action of the court at this time upon said motions to file additional conclusions of law and fact, and also further stated to the court that they continue their request that such additional conclusions of law and fact should be filed by the court within the time allowed by law and this bill of exceptions is requested by the plaintiffs and is ordered by the court to be filed as a part of the record in this case.

We request the court *the court* to allow this bill of exception.

WILSON, DABNEY & KING,
Attorneys for Plaintiffs.

Approved, in all things allowed.

J. D. HARVEY,
Judge Presiding.

Filed March 31st, 1916, O. M. Duclos, Clerk District Court, Harris Co. Texas, by B. J. Witt, Deputy.

Appeal Bond.

Filed Apr. 1, 1916.

In the District Court of Harris County, Texas, 80th Judicial District.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of International & Great Northern Railway Company, et al.

vs.

KARL L. DRUESEDOW, Tax Collector of Harris County, Texas, et al.

Whereas, in the above styled case on March 28th, 1916, a
140 judgment was entered in the District Court of Harris county, Texas, where this case was pending, that the plaintiffs take nothing by their action and otherwise as in the judgment set out, but that Karl L. Druesedow as Tax Collector of Harris county, Texas, and for purposes therein stated, recover of the plaintiffs $6,667.10 and interest at six per cent per annum, and that the defendants recover of the plaintiffs the costs of suit and otherwise in said judgment as set out; and

Whereas, within two days after the announcement of said judgment and entry of the same, to-wit: on March 30, 1916, the plaintiffs under leave of the court filed their amended motion for new trial; and

Whereas, on March 31st, 1916, said amended motion for a new trial was overruled by the court, to which action the plaintiffs excepted and gave notice of appeal to the Court of Civil Appeals of the First Supreme Judicial District of Texas.

Now, therefore, Know all men by these presents: That we, Jas. A. Baker and Cecil A. Lyon, Receivers of the International & Great Northern Railway Company and the International & Great Northern Railway Company, as Principals, and J. A. Pondran and Chas. Dillingham, as Sureties, do hereby acknowledge outselves bound to pay to Karl L. Druesedow, Tax Collector of Harris county, Texas, and to W. H. Ward, County Judge of Harris county, Texas, and to W. H. Lloyd, J. A. Smith, W. H. Kiser, and D. Barker, County Commissioners of Harris county, Texas, and to their successors, the sum of One Thousand Dollars ($1,000.00).

Conditioned that the said Jas. A. Baker and Cecil A. Lyon, as Receivers of the International & Great Northern Railway Company, and the International & Great Northern Railway Company, plaintiffs in this case, and appellants, shall prosecute their appeal with effect and shall pay all the costs which have accrued in the court below and which may accrue in the Court of Civil Appeals and the Supreme Court.

Witness our hands, this the first day of April, A. D. 1916.

JAS. A. BAKER,
CECIL A. LYON,
141 *Receivers of the International & Great Northern Railway Co.;*
THE INTERNATIONAL & GREAT NORTHERN RAILWAY,
By WILSON, DABNEY & KING,
Their Attorneys, Principals.

J. A. PONDRAN,
Surety.
CHAS. DILLINGHAM,
Surety.

STATE OF TEXAS,
County of Harris:

I, O. M. Duclos, Clerk of the District Court of Harris county, Texas, do hereby certify that I fix the probable amount of costs in the above styled suit in the trial court, in the court of Civil Appeals and in the Supreme Court at $500.00, and I do hereby certify that the foregoing bond was this day presented to me and is by me in all things approved and is now filed.

Witness my hand and seal of office, this first day of April, 1916.

O. M. DUCLOS,
Clerk of the District Court of Harris County, Texas,
By A. J. SCHWEIKART,
Deputy.

Filed April 1st, 1916.

O. M. DUCLOS,
Clerk District Court, Harris Co., Texas,
By A. J. SCHWEIKART,
Deputy.

Clerk's Cost Bill.

THE STATE OF TEXAS:

No. 68800.

JAS. A. BAKER, Recr., et al., Plaintiffs,
vs.
KARL L. DRUESEDOW et al., Defendants.

To Officers of Court, Dr.:

Clerk's Costs.

Docketing	$ .20
Filing	8.85
Assessing Damages	.50
Entering Appearances	1.05
Citations	3.75
Entering Orders	3.75
Entering Judgments	2.00
Docketing Motions	.30
Swearing Witness	1.80
Affidavits	.50
Subpœnas	1.00
Approving Bond	1.50
Transcript	74.50
Filing Brief & Certificate	.90
Taxing costs	.25
Total	$100.85

Sheriff's Costs.

Serving Citations	$4.50
Jury fees	.50
Subpœnas	2.00
Total	$7.00
Stenographer's fee	3.00

Witness Fees.

Jas. H. Wolf	$1.00

142

Recapitulation.

Clerk	$100.85
Sheriff	7.00
Stenographer's fee	3.00
Other costs	1.00
Total	$111.85

STATE OF TEXAS,
Harris County:

I, O. M. Duclos, Clerk District Court in and for Harris county, do hereby certify that the above is a correct bill of all costs incurred in the above numbered and entitled suit up to this date.

In Witness Whereof, I hereunto affix my hand and seal of the Court at office, in Houston, this the 15th day of June, 1916.

O. M. DUCLOS,
Clk. District Court, Harris Co., Texas,
[SEAL.] By G. W. RIESEL,
Deputy.

Clerk's Certificate.

THE STATE OF TEXAS,
County of Harris:

I, O. M. Duclos, Clerk of the District Court of Harris county, Texas, do hereby certify that the above and foregoing 148 pages is a true and correct transcript of all proceedings had in cause No. 68800 entitled Jas. A. Baker and Cecil A. Lyon, Receivers of I. & G. N. Railway Co. vs. Karl L. Druesedow, Tax Collector of Harris county, Texas, et al., as the same appears on file and of record in my office, with the exception of the statement of facts in said cause.

Given under my hand and seal of said Court, at office in Houston, Texas, this the 15th day of June, A. D. 1916.

O. M. DUCLOS,
Clk. District Court, Harris Co., Texas.
[SEAL.] By G. W. RIESEL,
Deputy.

Endorsed: 7339. Jas. A. Baker & Cecil A. Lyon, Receivers of International & Great Northern Railway Company et al., Appellant-, vs. Karl L. Druesedow, Tax Collector of Harris Co., Tex., et al., Appellee-. From Harris County. Applied for by Wilson, Dabney & King, on the 1st day of April, A. D. 1916, and delivered to Wilson, Dabney & King on the 16th day of June, A. D. 1916. O. M. Duclos, Clerk District Court, Harris County, by G. W. Riesel, Deputy. Filed in Court of Civil Appeals Jun. 20, 1916. H. L. Garrett, Clerk. No. 3272. Filed in Supreme Court, Mch. 19, 1919. F. T. Connerly, Clerk, by H. L. Clamp, Deputy. Judgment C. C. A. reversed and Judgment D. C. affirmed 3/23/21. Mo. rehearing 5101 overruled May 25/21.

143 In the District Court of Harris County, Texas.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of the International & Great Northern Railway Company, and the International & Great Northern Railway Company,

versus

KARL L. DRUESEDOW, Tax Collector of Harris County, Texas, et al.

Statement of Facts.

Be it remembered that upon the trial of the above styled case the following matters herein stated were agreed to, and that the following is a complete statement of all of the evidence introduced on the trial, and of all documents in evidence.

I.

Plaintiffs' Evidence.

(1) The plaintiffs offered in evidence the formulas in this Section (1) set out below, and proved that they were made by the State Tax Board and that the results thereof had been adhered to by that Board in their valuation or non-valuation of intangibles, and that they covered all of the intangible valuations of the Railroads of Texas made by the Board for the year 1915, except that the one designated (*a*) below was set aside by the Board and the one designated (*b*) below adopted by the Board as applicable to the International & Great Northern Railway Company hereinafter designated as the I. & G. N. Ry.

When these documents were offered in evidence the defendants objected thereto, but they were admitted in evidence over the defendants' objection and exception to the ruling of the court admitting them.

These documents were then introduced in evidence and are as follows:

144 (*a*) "International & Great Northern Ry. Co.

Gross Receipts, 1911	$9,782,165	
1912	11,254,327	
1913	10,902,041	
1914	9,645,785	
Total		$41,584,318
$41,584,318 ÷ 4		10,396,079
Capital Stock, outstanding	$4,822,000	
Mortgage Debt, par	26,181,500	
Total Capitalization		$31,003,500

$10,396,000 ÷ 31,003,500—
33.53 Ratio
12.50 " T. & P.
33.53 ÷ 12.50— 268.24

$4,822,000 × 268.24	$12,934,533	
Mortgage Debt at par	31,003,500	
True Value		$43,938,033
Physical Value		30,444,833
Intangible Value		$13,493,200"

(*b*) "International & Great Northern Ry. Co.

Gross Receipts, 1911	$9,782,165	
1912	11,354,327	
1913	10,902,041	
1914	9,645,785	
Total		$41,584,318
$41,584,318 ÷ 4		10,396,079
Capital Stock, issued and outstanding	$4,822,000	
Mortg. Debt at par	26,181,500	
Total Capitalization		$31,003,500

$10,396,079 ÷ 31,003,500—
33.53 Ratio
12.50 " T. & P.
33.53 ÷ 12.50— 268.24

$4,822,000 × 268.24	$12,934,533	
Mortg. Debt at par	26,181,500	
True Value		$39,116,033
Physical Value (assessed value)		28,372,810
Intangible Value		$10,743,223"

145 (*c*) "Abilene & Southern Ry. Co.

True Value		$1,087,066
Physical Value		928,160
Intangible Value		158,906"

(*d*) "Texas & New Orleans R. R. Co.

Gross Receipts, 1911	$3,984,275	
1912	4,407,520	
1913	4,371,085	
1914	4,092,073	
Total		$16,854,953
$16,854,953 ÷ 4		4,213,738
Capital Stock, outstanding	$5,000,000	
Mortg. Debt, par	10,039,195	
Secured Int. unpaid	192,779	
Total Capitalization		$15,231,974

$4,213,738 ÷ 15,231,974—
27.66 Ratio
12.50 " T. & P.
27.66 ÷ 12.50— 221.28

$5,000,000 × 221.28	$11,064,000	
Mortg. Debt & Int	10,230,954	
True Value		$21,294,954
Physical Value		14,293,990
Intangible Value		$7,000,964"

(*e*) "Angelina & Neches River Ry. Co.

Gross Receipts, 1911	$32,819	
1912	45,817	
1913	50,021	
1914	50,986	
Total		$179,643
$179,643 ÷ 4		44,910
Capital Stock		55,000
Lien Indebtedness		.....

$44,910 ÷ 55,000—
81.64 Ratio
12.50 " T. & P.
81.64 ÷ 12.50— 653.12

$55,000 × 653.12	359,216
True Value	359,000
Physical Value	359,000
Intangible Value	....."

146 (*f*) "Artesian Belt Railroad.

Gross Receipts, 1911	$53,972	
1912	73,618	
1913	47,006	
1914	41,284	
Total		$215,880
$215,880 ÷ 4		53,970
Capital Stock	$70,000	
Lien Indebtedness	792	
Total		$70,792

$53,970 ÷ 70,792—
76.23 Ratio
12.50 " T. & P.
76.23 ÷ 12 50— 609.84

$70,000 × 609.84	$426,888	
Lien Indebtedness	792	
True Value		$427,680
True Value		427,000
Physical Value		427,000
Intangible Value		.....”

(*g*) "The Asherton & Gulf Railway Co.

Gross Receipts, 1911	$26,613	
1912	30,320	
1913	21,900	
1914	20,337	
Total		$99,170
$99,170 ÷ 4		24,792
Capital Stock	$32,000	
Lien Indebtedness	.....	

$24,792 ÷ 32,000—
77.47 Ratio
12.50 " T. & P.
77.47 ÷ 12.50— 619.76

$32,000 × 619.76.....Actual Value	198,323	
True Value		$198,323
Physical Value		198,323
Intangible Value		.....”

147 (*h*) "Bartlett & Western Railway Co.

Gross Receipts, 1911	.....	
1912	$8,245	
1913	41,809	
1914	36,649	
Total		$86,703
$86,703 ÷ 3		28,901
Capital Stock	$41,700	
Lien Indebtedness	178,851	
Total		$210,551
$28,901 ÷ 210,551—		
13.72 Ratio		
12.50 " T. & P.		
13.72 ÷ 12.50— 109.76		
$41,700 × 109.76	$45,770	
Lien Indebtedness	178,851	
True Value		$224,621
Physical Value		224,621
Intangible Value		.....”

(*i*) "Beaumont, Sour Lake & Western Ry. Co.

Gross Receipts, 1911	$587,222	
1912	784,972	
1913	631,430	
1914	573,573	
Total		$2,577,197
$2,577,197 ÷ 4		644,299
Capital stock	$85,000	
Lien Indebtedness	2,333,774	
Total		$2,418,774
$644,299 ÷ 2,418,774—		
26.64 Ratio		
12.50 " T. & P.		
26.64 ÷ 12.50— 213.12		
$85,000 × 213.12	$181,152	
Lien Indebtedness	2,333,774	
True Value		$2,514,926
Physical Value		2,014,926
Intangible Value		$500,000

Ry. Com. Value 1912..... $1,925,000.
Assessed Value 935,720
Amount Borrowed ..... 2,057,824 & 222,000

Advisement.
(Insists, due no intangible.)"

148 (*j*) "Brownwood North & South Railway Co.

Gross Receipts, 1911.....	$2,705	
1912.....	16,242	
1913.....	13,908	
1914.....	6,945	
Total		$39,800
$39,800 ÷ 4.....		9,950
Capital Stock	$225,000	
Lien Indebtedness	91,000	
Total		$316,000

$9,950 ÷ 316,000—
3.15 Ratio
12.50 " T. & P.
3.15 ÷ 12.50— 25.20

$225,000 × 25.20.....	$56,700	
Lien Indebtedness	91,000	
True Value		$147,700
Physical Value		147,700
Intangible Value		.....'

(*k*) "Caro Northern Railway Co.

Gross Receipts, 1911.....	$19,634	
1912.....	24,760	
1913.....	26,400	
1914.....	19,158	
Total		$89,952
$89,952 ÷ 4.....		22,488
Capital Stock, outstanding.....		1,000,000

$22,488 ÷ 1,000,000—
22.50 Ratio
12.50 " T. & P.
22.50 ÷ 12.50— 180.00

True Value	180,000
Physical Value—200% assessed Val. 108,655.....	180,000
Intangible Value	.....'

149 (*l*) "Chicago, Rock Island & Gulf Ry. Co.

Gross Receipts, 1911	$3,215,384	
1912	3,269,516	
1913	3,351,475	
1914	3,050,856	
Total		$12,887,231
$12,887,231 ÷ 4		3,221,807
Capital Stock, outstanding	$469,000	
Lien Obligations	10,272,750	
Total Capitalization		10,741,750
$3,221,807 ÷ 10,741,750— 30.00 Ratio		
12.50 " T. & P.		
30.00 ÷ 12.50— 240.00		
$469,000 × 240.00	$1,125,600	
Lien Obligations	15,972,750	
True Value		16,708,670
Physical Value		13,075,820
Intangible Value		$3,632,850

7,800 per mile."

(*m*) "Crosbyton South Plains Railway Co.

Gross Receipts, 1911	$18,391	
1912	40,142	
1913	44,501	
1914	53,307	
Total		$156,341
$155,341 ÷ 4		39,085
Capital Stock	$150,000	
Lien Indebtedness	.....	
$39,085 ÷ 150,000— 26.05 Ratio		
12.50 " T. & P.		
26.05 ÷ 12.50— 208.40		
$150,000 × 208.40	312,600	
True Value		$312,600
Physical Value		312,600
Intangible Value		.....,"

(*n*) "Denison & Pacific Suburban Ry. Co.

Gross Receipts, 1911	$73,104	
1912	75,494	
1913	48,835	
1914	50,003	
Total		$247,436
$247,436 ÷ 4		61,859
Capital Stock, Outstanding	$100,000	
Lien Obligations (Bonds)	100,000	
Total		200,000
$61,859 ÷ 200,000—		
30.92 Ratio		
12.50 " T. & P.		
30.92 ÷ 12.50— 247.36		
Value of entire Stock	$247,360	
Lien Obligations	100,000	
True Value		347,360
Assessed Val. 67,850 × 2	$136,042	
Rolling Stock	10,000	
Physical Value		146,042
Intangible Value		$201,318

Advisement.
Pitts—(for reduction true value)."

(*o*) "Eastern Texas Railway Co.

Gross Receipts, 1911	$61,248	
1912	74,312	
1913	86,619	
1914	67,707	
Total		$289,886
$289,886 ÷ 4		72,471
Capital Stock		454,500
Lien Indebtedness		.....
$72,471 ÷ 454,500—		
16.39 Ratio		
12.50 " T. & P.		
16.39 ÷ 12.50— 131.12		
$454,500 × 131.12	$595,940	
True Value		595,940
Physical Value		595,940
Intangible Value		....."

151 (*p*) "El Paso & Northeastern R. R. Co.

Total Capital Stock	$300,000	
Net Income, 1914	37,858	
$37,858 Capitalized at 7%		$540,830
200% assessed value	$462,335	
Rolling Stock	28,445	
Physical Value		490,780
Intangible Value		$50,050
Gross Receipts, 1911	$202,154	
1912	222,828	
1913	332,464	
1914	308,097	
Total		$1,065,543
$1,065,543 ÷ 4		266,385"

(*q*) "El Paso & Southern Ry. Co.

Gross Receipts, 1911	$7,749	
1912	15,970	
1913	15,822	
1914	23,348	
Total		$62,889
$62,889 ÷ 4		15,722
Capital Stock, outstanding	$30,000	
Lien Obligations	.....	

$15,722 ÷ 30,000—
52.50 Ratio
12.50 " T. & P.
52.40 ÷ 12.50— 419.20

$30,000 × 419.20	$125,760	
Value Texas Share, 3418%		41,000
Physical Value		30,000
Intangible Value		$11,000"

152 (*r*) "El Paso & Southwestern R. R. Co.

Gross Receipts, 1911	$51,795	
1912	64,656	
1913	514,722	
1914	370,044	
Total		$1,001,217
$1,001,217 ÷ 4		250,304
Total Capital Stock	$2,000,000	
Net Income Reported	150,317	
$150,317 capitalized at 7%	$2,147,400	
True Value		$2,147,400
200% assessed Value	$920,040	
$462,470 × 2	.....	
Rolling Stock	5,960	
Physical Value		928,000
Intangible Value		$1,219,400

Advisement.
Harding."

(*s*) "Fort Worth & Denver City Ry. Co.

Gross Receipts, 1911	$4,851,084	
1912	5,074,822	
1913	5,100,503	
1914	4,984,346	
Total		$20,010,755
$20,101,755 ÷ 4 =		5,002,688
Capital Stock issued and outstanding	$9,375,000	
Lien Obligations	8,621.418	
Total Capitalization		17,996,418

$5,002,688 ÷ 17,996,418—
27.79 Ratio
12.50 " T. & P.
27.79 ÷ 12.50— 222.32

True Value	21,009,850
Physical Value	11,245,840
Intangible Value	$9,764,010"

153 (*t*) "Fort Worth & Rio Grande Ry. Co.

Gross Receipts, 1911	$948,334	
1912	933,296	
1913	848,621	
1914	807,806	
Total		$3,538,057
$3,538,057 ÷ 4 =		884,514
Capital Stock, outstanding	$2,928,300	
Bonded Obligations	4,467,000	
Total Capitalization		$7,395,300
$884,214 ÷ 7,395,300—11.96 Ratio		
12.50 " T. & P.		
11.96 ÷ 12.50— 95.68		
$2,928,300 95.68—Actual Val.	$2,801,797	
Bonded Obligations at 50¢	2,233,500	
True Value		$4,158,752
Physical Value		3,717,212
Intangible Value		441,540

Assess at $2,000 per mile."

(*u*) "Galveston, Harrisburg & San Antonio Ry. Co.

Gross Receipts, 1911	$11,055,937	
1912	12,245,649	
1913	12,155,333	
1914	11,982,345	
Total		$47,439,264
$47,439,264 ÷ 4 =		11,859,816
Capital Stock	$27,084,400	
Lien Indebtedness	36,364,661	
Total		$63,449,061
$11,859,816 ÷ 63,449,061—18.69 Ratio		
12.50 " T. & P.		
18.69 ÷ 12.50— 149.52		
$27,084,400 × 149.52	$40,496,595	
Lien Indebtedness	36,364,661	
True Value		$55,064,200
		29,435,000
Intangible Value		$25,629,200"

154 (*v*) "Galveston, Houston & Henderson R. R. Co.

Gross Receipts, 1911	$531,231	
1912	603,112	
1913	477,798	
1914	306,536	
Total		$1,918,677
$1,918,677 ÷ 4 =		479,669
Capital Stock, outstanding	$1,000,000	
Lien Indebtedness	2,122,000	
Total capitalization		$3,122,000
$479,669 ÷ 3,122,000—15.36 Ratio		
12.50 " T. & P.		
15.36 ÷ 12.50— 122.88		
$1,000,000 × 122.80	$1,228,800	
Bonds at par	2,122,000	
True Value		$3,350,800
Physical Value		2,957,961
Intangible Value		$392,839"

(*w*) "*Groveton, Lufkin & Northern Ry. Co.*

Gross Receipts, 1911	$53,632	
1912	73,257	
1913	70,091	
1914	66,671	
Total		$263,651
$263,651 ÷ 4 =		65,912
Capital Stock	$50,000	
Lien Indebtedness	437,000	
Total		487,000
$65,912 ÷ 487,000—13.52 Ratio		
12.50 " T. & P.		
13.53 ÷ 12.50— 108.24		
$50,000 × 108.24	$54,120	
Lien Indebtedness	437,000	
True Value		$491,120
Physical Value		471,120
Intangible Value		$20,000

Assessed value.... $473,760
R. R. Value..... 487,487
Borrow .....437"

155 (*x*) "*Quanah, Acme & Pacific Ry. Co.*

Gross Receipts, 1911	$172,560	
1912	194,881	
1913	220,654	
1914	224,570	
Total		$812,665
$812,565 ÷ 4 =		203,166
Capital Stock, issued and outstanding	$100,000	
Lien Obligations (sold)	1,758,000	
Total Capitalization		$1,858,000
$203,166 ÷ 1,858,000—10.93 Ratio		
12.50 " T. & P.		
10.93 ÷ 12.50— 87.44		
True Value		$1,936,720
Physical Value		1,699,960
Intangible Value		$53,589,565

(Same as last year on account of heavy county assessment Taxes paid for 1914—$10,387 on $1,766,720.)"
Advisement."

(*y*) "Gulf, Colorado & Santa Fe Ry. Co.

Gross Receipts, 1911	$12,606,595	
1912	13,855,806	
1913	11,446,114	
1914	15,681,050	
Total		$53,589,565
$53,589,565 ÷ 4 =		13,397,391
Total Mileage 1937.07		
Texas Mileage 1773.89—Texas %	91.57	
Cap. Stock, issued and outstanding	$4,560,000	
Texas Share	4,173,000	
Mortgage Debt	$21,310,000	
Other Secured Indebtedness	28,836,394	
Total	$50,146,394	
$50,146,394 × 91.57	$45,919,053	Texas Share
Texas Share, Stock	4,173,000	
Total Cap.	$50,092,053	

$13,397,391 ÷ 50,092,053—26.74 Ratio		
12.50 " T. & P.		
26.74 ÷ 12.50— 213.92		
$4,173,000/213.92	$8,926,882	
Value Mortg. Debt	45,191,053	
True Value		$54,845,935
Physical Value		29,047,033
Intangible Value		$25,778,902

225 additional miles
at 13, 800 "

156 (z) "*Gulf, Texas & Western Ry. Co.*

Gross Receipts, 1911	$65,480	
1912	86,470	
1913	130,267	
1914	167,503	
Total		$449,720
$449,720 ÷ 4 =		112,430
Capital Stock	$500,000	
Lien Indebtedness	$1,000,154	
Total		$1,506,154
$112,430 ÷ 1,506,154— 7.46 Ratio		
12.50 " T. & P.		
7.46 ÷ 12.50— 59.68		
$500,000 × 59.68	$298,400	
	1,006,154	
True Value		$1,304,554
Physical Value		1,304,554
Intangible Value		.....”

(*aa*) "Houston & Brazos Valley Ry. Co.

Gross Receipts, 1911	$20,312	
1912	39,948	
1913	50,604	
1914	82,853	
Total		$193,717
$193,717 ÷ 4 =		48,429
Capital Stock	$24,000	
Lien Indebtedness	378,000	
Total		$402,000

$48,429 ÷ 618,000—12.00 Ratio			
12.50 Ratio T. & P.			
12.00 ÷ 12.50— 96.00			
$24,000 × 96.00		$23,000	
Indebtedness		378,000	
True Value			$401,000
Physical Value			301,000
Intangible Value			$100,000

(This Co. has a lien indebtedness of $420,000 which they swear is worth 90¢ their total assessment—Rolling Stock, 18,685
other property 72,900
91,585
they should be made to pay some taxes.)"

157 (*bb*) "Houston, East & West Texas Ry. Co.

Gross Receipts, 1911		$1,315,135	
1912		1,336,345	
1913		1,440,492	
1914		1,410,766	
Total			$5,502,738
$5,502,738 ÷ 4 =			1,375,684
Bonded Debt at par		$3,000,000	
Unpaid Interest		26,550	
Cap. Stock issued and outs		1,920,000	
Total Capitalization			$4,946,550
$1,375,684 ÷ 4,946,550— 27.80 Ratio			
12.50 " T. & P.			
27.80 ÷ 12.50— 222.40			
$1,920,000 × 222.40		$4,270,080	
Bonded Debt at par		3,000,000	
Unpaid Interest		25,500	
True Value			$6,295,580
Physical Value			4,068,525
Intangible Value			$2,227,055"

(*cc*) "Houston & Texas Central R. R. Co.

Gross Receipts, 1911	$6,317,262	
1912	6,351,639	
1913	6,847,872	
1914	6,604,202	
Total		$26,120,975
$26,120,975 ÷ 4 =		6,530,243
Secured Indebtedness at par.		
Mortgages	12,570,000	
Accrued Interest	173,825	
Total	12,743,825	
Capital stock, par	10,000,000	
Total capitalization		$22,743,825

$6,530,243 ÷ 22,743,825— 28.71 Ratio
12.50 " T. & P.
28.71 ÷ 12.50— 229.68

$10,000,00 × 229.68	22,968,000	
Lien Obligations, par	12,570,000	
True Value		$35,538,000
Physical Value		22,548,992
Intangible Value		$12,989,008"

158 (*dd*) "Jefferson & Northwestern Ry. Co.

Gross Receipts, 1911	$11,543	
1912	40,658	
1913	44,829	
1914	39,746	
Total		$136,776
$136,776 ÷ 4 =		24,194
Capital Stock	$50,000	
Lien Indebtedness	60,000	
Total		$110,000

$24,194 ÷ 110,000— 21.99 Ratio
12.50 " T. & P.
21.99 ÷ 12.50— 215.92

$50,000 × 215.92	$107,960	
Lien Indebtedness	60,000	
True Value		$167,960
Physical Value		167,960
Intangible Value		....."

(*ee*) "Kansas City Mexico & Orient Ry. Co.

Gross Receipts, 1911	$693,822	
1912	862,768	
1913	975,389	
1914	1,162,022	
Total		$3,964,001
$3,694,001 ÷ 4 =		923,665
Capital Stock	$1,000,000	
Lien Indebtedness	4,810,000	
Total		$5,810,000

$923,665 ÷ 5,810,000— 15.89 Ratio
12.50 " T. & P.
15.89 ÷ 12.50— 117.12

$1,000,000 × 117.12	$1,171,200	
Lien Indebtedness	4,810,000	
True Value		$5,981,200
Physical Value		5,481,200
Intangible Value		$500,000

Advisement."
W. E. Barnhardt, Kansas City."

159 (*ff*) "International & Great Northern Ry. Co.)

Gross Receipts, 1911	$9,782,165	
1912	11,254,327	
1913	10,902,041	
1914	9,645,785	
Total		$41,584,318
$41,584,318 ÷ 4 =		10,396,079
Capital Stock, outstanding	$4,822,000	
Mortg. Debt at par	26,181,500	
Total capitalization		$31,003,500

$10,396,079 ÷ 31,003,500—	33.53	Ratio
	12.50	" T. & P.
33.53 ÷ 12.50—	268.24	
$4,822,000 × 268.24	$12,934,533	
Mortg. Debt at par	26,181,500	
True Value		$39,116,033
Physical value		28,372,810
Intangible Value		$10,743,223"

(*gg*) "Marshall & East Texas Railway Co.

Gross Receipts, 1911	$207,454	
1912	206,023	
1913	198,304	
1914	160,233	
Total		$772,014
$772,014 ÷ 4 =		193,000
Capital Stock outstanding	$200,000	
Lien Obligations	1,622,470	
Total Capitalization		$1,822,470
True Value		1,353,000
Physical Value		1,316,796
Intangible Value		$36,204

(Reduction of $10,000 from last year, Road in bad shape, not able to pay interest and runs on deficit three years out of last four.)"

160 (*hh*) "Missouri, Kansas & Texas Ry. Co. of Texas.

Gross Receipts, 1911	$10,850,778	
1912	12,159,019	
1913	12,632,572	
1914	13,290,510	
Total		$48,932,879
$48,932,879 ÷ 4 =		12,233,219
Capital Stock, outstanding	$10,152,500	
Bonds at par	37,947,154	
Total Capitalization		$48,099,654
$12,233,219 ÷ 48,099,654—	25.43	Ratio
	12.50	" T. & P.
25.43 ÷ 12.50—	203.44	

$10,152,500 × 203.44	$20,654,246	
Bonded obligations	37,947,154	
True Value		$57,260,671
Physical Value		37,116,181
Intangible Value		$20,144,490"

(*ii*) "Missouri, Oklahoma & Gulf Ry. Co. of Texas.

Gross Receipts, 1911	$78,531	
1912	114,416	
1913	78,531	
1914	121,672	
Total		$393,150
$393,150 ÷ 4 =		98,287
Capital Stock, outstanding	$10,000	
Bonds	350,000	
Total Capitalization		$360,000

$98,287 ÷ 360,000— 27.30 Ratio
12.50 " T. & P.
27.30 ÷ 12.50— 218.40

$10,000 × 218.40	$21,840	
Lien Obligations	350,000	
True Value		$371,840
Physical Value		350,000
Intangible Value		$21,840

Advisement."

161 (*jj*) "Moscow, Camden & San Augustine Ry. Co.

Gross Receipts, 1911	$9,085	
1912	20,049	
1913	19,117	
1914	18,280	
Total		$6,531
$66,531 ÷ 4 =		16,632
Capital Stock	$50,000	
Lien Indebtedness	.....	

$16,632 ÷ 50,000— 33.26 Ratio
12.50 " T. & P.
33.26 ÷ 12.50— 266.08

$50,000 × 266.08	$133,040	
True Value		$133,040
Physical Value		133,040
Intangible Value		$.....

(*kk*) "Nacogdoches & Southeastern R. R. Co.

Gross Receipts, 1911	$19,687	
1912	22,416	
1913	20,306	
1914	24,361	
Total		$86,770
$86,770 ÷ 4 =		21,692
Capital Stock	$245,400	
Lien Indebtedness	.....	

$21,692 ÷ 245,400— 8.84 Ratio
12.50 " T. & P.
8.84 ÷ 12.50— 70.72

$245,400 × 70.72	$173,546	
True Value		$173,546
Physical Value		173,546
Intangible Value		.....

162 (*ll*) "Orange & Northwestern R. R. Co.

Gross Receipts, 1911	$118,311	
1912	193,094	
1913	166,239	
1914	188,311	
Total		$665,955
$665,955 ÷ 4		166,488
Capital Stock	$35,000	
Lien Indebtedness	1,162,965	
Total		$1,197,965

$166,488 ÷ 1,197,965—13.89 Ratio.
12.50 " T. & P.
13.89 ÷ 12.50..... 111.12

$35,000 × 111.12	$38,892	
Lien Indebtedness	1,162,965	
True Value		$1,201,857
Physical Value		1,201,857
Intangible Value		.....

(*mm*) "Panhandle & Santa Fe Ry. Co.

Gross Receipts, 1911	$1,393,059	
1912	1,533,795	
1913	1,376,377	
1914	2,679,413	
Total		$6,982,644
$6,982,644 ÷ 4		1,745,661
Capital Stock	$604,500	
Lien Indebtedness	7,229,526	
Total		$7,834,026

$1,745,661 ÷ 7,834,026—22.28 Ratio.
12.50 " T. & P.
22.28 ÷ 12.50 ..... 178.24

$604,500 × 178.24	$110,261	
Lien Indebtedness	7,229,526	
True Value		$7,339,787
Physical Value		5,091,227
Intangible Value		$2,248,560"

163 (*nn*) "Paris & Great Northern Ry. Co.

Gross Receipts, 1911	$250,889	
1912	271,041	
1913	191,748	
1914	110,825	
Total		$824,503
$824,503 ÷ 4		206,125
Capital Stock, outstanding	$500,000	
Lien Obligations	339,000	
Total Capitalization		$839,000

$206,125 ÷ 839,000—24.55 Ratio.
12.50 " T. & P.
24.55 ÷ 12.50 .... 196.40

$500,000 × 196.40	$982,000	
Lien Obligations	339,000	
True Value		$1,321,000
Physical Value		405,212
Intangible Value		915,788

Advisement—last year 647,000.
J. E. Turner—"

(*oo*) "Paris & Mt. Pleasant R. R. Co.

Gross Receipts, 1911	$56,535	
1912	60,951	
1913	123,141	
1914	135,214	
Total		$275,841
$375,841 ÷ 4		93,960
Capital Stock, outstanding	$75,000	
Bonds at par	600,000	
Total		$675,000

$93,960 ÷ 675,000—13.92 Ratio.
12.50 " T. & P.
13.92 ÷ 12.50... 111.36

$75,000 × 111.36	$83,520	
Lien Obligations	600,000	
True Value		$683,520
Physical Value		380,732
Intangible Value		$302,788

164 (*pp*) "Pecos Northern Ry. Co.

Gross Receipts, 1911	$1,748,134	
1912	2,517,771	
1913	2,445,800	
1914	1,530,136	
Total		$8,241,841
$8,241,841 ÷ 4		2,060,460
Capital Stock	$710,000	
Lien Indebtedness	13,790,946	
Total		$14,500,946

$2,060,460 ÷ 14,500,946—14.22 Ratio.
12.50 " T. & P.
14.22 ÷ 12.50..... 113.76

$710,000 × 113.76	$807,696	
Indebtedness	13,790,946	
True Value		$14,598,642
Physical Value		$11,489,547
Intangible Value		$3,109,095

(*qq*) "Pecos River R. R. Co.

Gross Receipts, 1911	$63,375	
1912	47,873	
1913	23,212	
1914	5,018	
Total		$139,478
$139,478 ÷ 4		34,869
Capital Stock	$691,200	
Indebtedness	696,000	
Total		$1,387,200

$34,869 ÷ 1,387,200—2.51 Ratio.
12.50 " T. & P.
2.51 ÷ 12.50..... 20.08

$691,200 × 20.08	$138,793	
Lien Indebtedness	696,000	
True Value		$834,793
Physical Value		834,793
Intangible Value		.....”

165 (*rr*) "Pecos Valley Southern Ry. Co.

Gross Receipts, 1911	$32,593	
1912	31,843	
1913	35,880	
1914	34,109	
Total		$134,425
$134,425 ÷ 4		33,608
Capital Stock	$45,000	
Lien Indebtedness	37,227	
Total		$82,227

$33,606 ÷ 82.227—40.87 Ratio.
12.50 " T. & P.
40.87 ÷ 12.50.. 326.96

$45,000 × 326,96	$147,232	
Lien Indebtedness	37,227	
True Value		$493,385
Physical Value		493,385
Intangible Value		.....”

(*ss*) "Rio Grande & Eagle Pass Ry. Co.

True Value		$563,228
Physical Value		363,228
Intangible Value		200,000"

166 (*tt*) "Rio Grande, El Paso & Santa Fe Ry. Co.

Gross Receipts, 1911	$199,620	
1912	234,840	
1913	254,578	
1914	282,522	
Total		$971,560
$971,560 ÷ 4		242,890
Capital Stock, outstanding	$200,000	
Lien Obligations	531,027	
Total		$731,027

$242,890 ÷ 731,027—33.22 Ratio.
12.50 " T. & P.
33.22 ÷ 12.50 .... 265.76

2,000 shares stock @ 265,76	$531,520	
Lien Obligations	531,027	
True Value		$1,062,547
200% assessed 1914	$567,539	
Rolling Stock, 1914	116,894	
Physical Value		$684,433
Intangible Value		$378,114

Advisement.

O. L. Clarke."

(*uu*) "Rio Grande Railway Company.

Gross Receipts, 1911	$10,839	
1912	13,208	
1913	11,545	
1914	12,702	
Total		$48,294
$48,294 ÷ 4		12,073
Capital Stock	$25,000	
Lien Indebtedness	65,000	
Total		$90,000

$12,073 ÷ 90,000—13.41 Ratio.
12.50 " T. & P.
13.41 ÷ 12.50.. 107.28

$25,000 × 107.28	$26,820	
Lien Indebtedness	65,000	
True Value		$91,820
True Value—(R. R. Com.)		$310,000
Physical Value		310,000
Intangible Value		.....,"

167 (*vv*) "Roscoe, Snyder & Pacific Ry. Co.

Gross Receipts, 1911	$75,874	
1912	51,448	
1913	74,344	
1914	140,016	
Total		$341,682
$341,682 ÷ 4		85,421
Capital Stock	$150,000	
Lien Indebtedness	307,511	
Total		$1,807,511

$85,421 ÷ 1,807,511—4.72 Ratio.
12.50 " T. & P.
4.72 ÷ 12.50..... 37.76

$150,000 × 37.76	$56,640	
Lien Indebtedness	307,511	
True Value		$364,151
True Value—(R. R. Com.)		$723,173
Physical Value		723,173
Intangible Value		.....,"

(*ww*) "St. Louis, Brownsville & Mexico Ry. Co.

Gross Receipts, 1911	$2,226,989	
1912	2,695,731	
1913	2,748,741	
1914	2,563,256	
Total		$10,234,717

$10,234,717 ÷ 4		2,558,679
Capital Stock, outstanding	$500,000	
Bonds	$12,147,106	
Unpaid int. on same	1,504,918	
Receivers' certificates outset	971,000	
Int. unpaid Dec. 31/14	12,137	
Equipment Trust notes and Int.	8,240	
Total		$14,643,401
$14,643,401 × 80¢ on $1.00	$11,714,720	
$500,000 × 50¢	250,000	
True Value		$11,964,720
Physical Value		11,711,690
Intangible Value		$253,030"

168 (*xx*) "St. Louis, San Francisco & Texas Railway Company.

Gross Receipts, 1911	$1,239,092	
1912	1,444,327	
1913	1,539,919	
1914	1,304,191	
Total		$5,527,529
$5,527,529 ÷ 4		1,381,882
Capital Stock	$804,000	
Lien Indebtedness	1,188,00	
Total		$1,992,000

$1,381,882 ÷ 1,992,000—69.37 Ratio.
12.50 " T. & P.
69.37 ÷ 12.50..... 554.96

$804,000 × 554.96	$4,461,878	
Lien Indebtedness	1,188,000	
True Value		$5,649,878
True Value—(R. R. Com.)		$2,000,000
Physical Value		2,000,000
Intangible Value		.....,"

(*yy*) "St. Louis Southwestern Ry. Co. of Texas.

Gross Receipts, 1911	$4,460,000	
1912	4,875,000	
1913	5,042,118.2	
1914	4,218,100	
Total		$18,595,218

$18,595,218 ÷ 4		4,648,804
Capital Stock outstanding	$2,750,000	
First Mortg. Bonds	10,677,000	
Second "	5,052,500	
Total Capitalization		$18,479,500
$4,648,804 ÷ 18,479,500—25.15 Ratio.		
12.50 " T. & P.		
First Mortg. 5% bonds at par	$572,000	
Second Mortg. 4% @ 85¢	8,038,250	
" " Inc. bonds @ 70¢	2,567,500	
Total	$12,177,750	
Capital Stock	2,750,000	
True Value		$14,232,540
Physical Value		10,408,885
Intangible Value		$3,823,655

Advisement.
S. P. Ross."

169 (zz) "San Antonio & Aransas Pass Ry. Co.

Gross Receipts, 1911	$4,317,863	
1912	5,008,260	
1913	4,856,684	
1914	4,130,356	
Total		$18,313,163
$18,313,163 ÷ 4		4,578,291
Capital Stock	$1,000,000	
Lien Indebtedness @ 90¢	16,479,443	
Total Capitalization		$17,479,443
$4,578,291 ÷ 17,479,443—26.19 Ratio.		
12.50 " T. & P.		
26.19 ÷ 12.50	209.52	
$1,000,000 × 209.52	$2,095,200	
Lien Indebtedness	16,479,443	
True Value		$18,574,643
Physical Value		12,711,863
Intangible Value		$5,862,780"

(*aaa*) "San Antonio, Uvalde & Gulf R. R. Co.

Gross Receipts, 1911		$201,552	
1912		376,774	
1913		434,320	
1914		.....	
Total			$1,012,646
$1,012,646 ÷ 3			337,548
Capital Stock		$280,000	
Lien Indebtedness		4,413,000	
Total			$4,693,000
$337,548 ÷ 4,693,000—7.19 Ratio.			
12.50 " T. & P.			
7.19 ÷ 12.50	57.52		
$280,000 × 57.52		$161,056	
Lien Indebtedness		4,413,000	
True Value			$4,574,056
Physical Value			4,574,056
Intangible Value			.....

170 (*bbb*) San Benito & Rio Grande Valley Ry.

Gross Receipts, 1911			
1912			
1913		$37,285	
1914		81,873	
Total			$119,158
$119,158÷2=			59,579
Capital Stock		$70,000	
Lien Indebtedness		953,735	
Total			$1,023,735
$59,579÷1,023,735= 5.82 Ratio.			
12.50 " T. & P.			
5.82÷12.50	46.56		
$70,000×46.56		$32,592	
Lien Indebtedness		953,735	
True Value			$986,327
Physical Value			986,327
Intangible Value			.....

(*eee*) "Shreveport, Houston & Gulf R. R. Co.

Gross Receipts,	1911	$28,753	
	1912	25,191	
	1913	21,178	
	1914	23,495	
Total			$98,617
$98,617÷4=			24,654
Capital Stock, outstanding		5,000	
$24,654÷5,000=493.06 Ratio.			
12.50 " T. & P.			
493.06÷12.50	3,944.48		
True Value, $5,000×3,944.48			$161,024
Physical Value			136,024
Intangible Value			25,000"

171 (*ddd*) "Southwestern Railway Co.

Gross Receipts,	1911	$25,077	
	1912	32,250	
	1913	24,473	
	1914	24,378	
Total			$106,178
$106,178÷4=			26,544
Capital Stock		$35,000	
Lien Indebtedness		66,375	
Total			$101,375
$26,544÷101,375= 26.18 Ratio.			
12.50 " T. & P.			
26.18÷12.50	209.44		
$35,000×209.44		$73,304	
Lien Indebtedness		66,375	
True Value			$139,679
True Value			389,905
Physical Value			389,905
Intangible Value			....."

(*eee*) "Stephenville North & South Texas Ry. Co.

Gross Receipts, 1911	$133,139	
1912	205,036	
1913	133,447	
1914	130,350	
Total		$601,972
$601,972÷4=		150,493
Capital Stock, outstanding	$138,300	
Bonded Debt	2,607,000	
Total		$2,745,300
$150,493÷2,745,300= 5.48 Ratio.		
12.50 " T. & P.		
5.48÷12.50 43.84		
$138,000×43.84	$50,500	
Lien Obligations	2,607,000	
True Value		$2,667,500
Physical Value		2,562,320
Intangible Value		$105,180"

172 (*fff*) "Sugar Land Ry. Co.

Gross Receipts, 1912	$112,670	
1913	112,491	
1914	134,534	
Total		$359,695
$359,695÷3		119,989
Capital Stock	$109,400	
Lien Indebtedness	384,000	
Total		$493,400
$119,898÷493,400= 24.30 Ratio.		
12.50 " T. & P.		
24.30÷12.50 194.40		
$109,400×194.40	$212,674	
Lien Indebtedness	384,000	
True Value		$596,674
Physical Value		461,674
Intangible Value		$135,000

Reduced $65,000 on account of condition of Road, Cane Bet pays no intang."

(*ggg*) "Texarkana & Ft. Smith Ry. Co.

Gross Receipts,	1911	$954,047	
	1912	1,015,281	
	1913	1,013,111	
	1914	1,000,495	
Total			$3,982,934
$3,982,934÷4			995,733
Capital Stock, outstanding		$100,[illegible]	
Lien Obligations		2,486,251	
Total Capitalization			$2,586,251

$995,733÷2,586,251= 38.50 Ratio.
12.50 " T. & P.
38.50÷12.50 308.00

81.10@21,000 per mile	$1,703,100	
Mortg. Bonds	2,486,251	
Cap. Stock	100,000	
True Value		$4,189,351
Physical Value		2,169,961
Intangible Value		$2,019,390"

173 (*hhh*) "Texas Arkansas & Louisiana Ry. Co.

Gross Receipts,	1911	$13,175	
	1912	13,181	
	1913	10,712	
	1914	13,766	
Total			$50,834
$50,834÷4			12,708
Capital Stock		$25,000	
Lien Indebtedness			

$12,708÷25,000= 50.83 Ratio.
12.50 " T. & P.
50.83÷12.50 406.64

$25,000×406.64		$101,960
True Value		$101,960
Physical Value		101,960
Intangible Value		....."

(*iii*) "Texas Mexican Ry. Co.

Gross Receipts, 1911	$206,500	
1912	351,300	
1913	367,300	
1914	325,000	
Total		$1,350,100
$1,350,000÷4		337,525
Capital Stock, estimated @ 10% for control $2,500,000	$250,000	
R. R. Com. Phys. Value	1,457,638	
True Value		$1,707,638
Physical Value		1,457,638
Intangible Value		$250,000

Advisement.

R. L. Woodhul—claims not due any intangible."

174 (*jjj*) "Texas Midland Railroad Co.

Gross Receipts, 1911	$645,314	
1912	748,200	
1913	765,755	
1914	632,942	
Total		$2,792,211
$2,792,211÷4		698,052
Capital Stock, outstanding	$112,000	
Lien Obligations	2,000,000	
Total Capitalization		$2,112,000
$698,052÷2,112,000= 33.05 Ratio.		
12.50 " T. & P.		
33.05÷12.50 264.40		
$112,000×264.40	$296,128	
Bonds	2,000,000	
True Value		$2,296,128
Physical Value		1,584,939
Intangible Value		$711,189

Advisement.

L. W. Wells—Operating at a loss of $56,000 per year 1910-11-12-13-14."

(*kkk*) "Texas & Pacific Railway Company.

Gross Receipts, 1911		$11,079,618	
1912		12,341,684	
1913		12,381,305	
1914		11,745,562	
Total			$47,548,169
$47,548,169÷4			11,887,042
Stock issued and outstanding		$38,763,810	
Bonded Debt.			
1st Mortg. (Par)	$24,992,975		
1st " "	4,970,000		
2nd Mortg. "	24,987,036		
	54,950,011		
Secured Int. accrued	1,498,500		
Total		$56,448,511	
Total Capitalization			$95,212,321
$11,887,042÷95,212,321=12.48 Ratio.			
$38,763,810×12.50 Val. Stk		$4,845,476	
Lien Obligations		56,448,511	
True Value entire line		$61,293,987	
True Value, Texas share $61,293,987×57.60			$35,305,336
Physical Value			15,588,147
Intangible Value			$19,717,189"

175 (*lll*) "Texas Short Line Ry. Co.

Gross Receipts, 1911	$51,443	
1912	67,891	
1913	66,630	
1914	51,226	
Total		$237,190
$237,190÷4	$11,000	
Bonds	175,000	
Notes	13,113	
Total Capitalization		$199,113

$59,297÷199,113= 29.78 Ratio.
12.50 " T. & P.
20.36÷12.50 238.24

$11,000×238.24	$26,206	
Lien Obligations	188,113	
True Value		$214,319
Physical Value 200% 93,042		186,236
Intangible Value		$28,083"

(*mmm*) "Texas Southeastern Ry. Co.

Gross Receipts, 1911	$104,809	
1912	105,642	
1913	118,813	
1914	105,603	
Total		$434,867
$434,867÷4		108,717
Capital Stock	$238,900	
Lien Indebtedness		

$108,717÷238,900= 45.50 Ratio.
12.50 " T. & P.
45.50÷12.50 364.00

$238,900×364,00	$869,596	
True Value (R. R. Com)		$536,393
Physical Value		536,393
Intangible Value		....."

176 (*nnn*) "Timpson & Henderson Railway Co.

Gross Receipts, 1911	$48,768	
1912	59,973	
1913	52,800	
1914	46,096	
Total		$207,637
$207,637÷4		51,909
Capital Stock	$250,000	
Lien Indebtedness	27,935	
Total		$277,935

$51,909÷277,935= 18.67 Ratio.
12.50 " T. & P.
18.67÷12.50 149.36

$250,000×149.36	$373,400	
Lien Indebtedness	27,935	
True Value		$401,335
Physical Value		401,335
Intangible Value		$.....”

(*ooo*) “Trinity & Brazos Valley Ry. Co.

Gross Receipts, 1911	$2,195,640	
1912	2,864,009	
1913	2,497,348	
1914	1,528,846	
Total		$9,085,843
$9,085,843÷4		2,271,460
Capital Stock, outstanding	$304,000	
Bonds and Equipment oblig.	9,009,654	
Total Capitalization		$9,313,654

$2,271,460÷9,313,654= 24.38 Ratio.
12.50 “ T. & P.
24.38÷12.50 195.04

$304,000×195.04	$592,922	
Obligations at par	9,009,654	
True Value		.....
Physical Value (R. R. Com.)		$9,064,000
Intangible Value		$.....”

(None) “

177 (*ppp*) “Trinity Valley & Northern Ry. Co.

Gross Receipts, 1911		
1912		
1913	$22,508	
1914	22,430	
Total		$44,938
$44,938÷2		22,469
Capital Stock	$25,000	
Lien Indebtedness	69,883	
Total		$94,883

$22,469÷94,883= 23.69 Ratio.
12.50 “ T. & P.
23.69÷12.50 189.52

$25,000×189.52	$47,380	
Lien Indebtedness	69,883	
True Value		$117,263
Physical Value		117,263
Intangible Value		

(*qqq*) "Trinity Valley Southern R. R. Co.

Gross Receipts, 1911	$10,900	
1912	19,995	
1913	20,781	
1914	16,077	
Total		$67,753
$67,753÷4		16,938
Capital Stock, outstanding	$20,000	

$16,938÷20,000= 8.47 Ratio.
12.50 " T. & P.
8.47÷12.50 67.76

True Value		$40,000
Physical Value		30,400
Intangible Value		$9,600

178 (*rrr*) "Weatherford, Mineral Wells & Northwestern Railway Co.

Gross Receipts, 1911	$132,871	
1912	156,130	
1913	165,242	
1914	149,469	
Total		$603,712
$603,712÷4		150,928
Capital Stock, outstanding	$100,000	
Lien obligations	660,000	
Total Capitalization		$760,000

$150,928÷760,000= 19.85 Ratio.
12.50 " T. & P.
19.85÷12.50 158.80

Value of Stock	$158,900	
Bonds	660,000	
True Value		$818,900
Physical Value		700,000
Intangible Value		$118,900"

(*sss*) "Wichita Valley Railway Company and Leased Lines.

Gross Receipts, 1911	$759,258	
1912	715,761	
1913	743,821	
1914	799,983	
Total		$2,018,823
$3,018,823÷4		754,705
Capital Stock	$1,226,500	
Lien Indebtedness	4,158,880	
Total		$5,385,380
$754,705÷5,385,380= 14.01 Ratio.		
12.50 " T. & P.		
14.01÷12.50 112.08		
True Value		$5,385,380
Physical Value		4,340,000
Intangible Value		$1,045,380"

179 (2) The plaintiffs offered in evidence a stenographic transcript of the proceedings before the State Tax Board at the regular hearing required by law and held on the 18th of June, A. D. 1915, at Austin, Texas, by the State Tax Board, in order to determine whether or not the preliminary assessment or valuation of the claimed intangibles of the I. & G. N. Railway Company, as set forth in formula (*b*) above should be maintained, or to determine whether or not the preliminary valuation of intangibles of the I. & G. N. Railway of $10,743,223.00 should be maintained.

This stenographic transcript was agreed upon as correct.

To the introduction of this transcript Counsel for the defendants objected, and the objections being overruled, they excepted and the transcript was introduced. Plaintiffs' Counsel stated that it was introduced in order to show the information before the State Tax Board as evidence that the State Tax Board had full light and still adhered to their valuation, after this hearing, of $10,743,223.00 and also that it was introduced in connection with the contention of the plaintiffs that the Board had acted in legal fraud.

This transcript was then introduced in evidence and is as follows:

"Mr. Dabney: Shall the I. & G. N. proceed now, Mr. Commissioner?

Cha-rman Bagby: Yes sir.

Mr. Dabney: Is it your desire to await the return of the other Commissioner?

Cha-rman Bagby: No, he left of his own motion. I want to pay particular attention to this I. & G. N., because we reduced it $3,000,000.00.

Mr. Dabney: Gentlemen, I have reduced our case largely to a written statement. Our testimony, I think, can be very briefly put in. Appended to this written statement which I am handing you, is some of the more important of our statistics. I think I can make more speed with the Board by simply reading this statement over, and then we will introduce our testimony, and I would ask you—I will ask the Board particularly to follow our statement, and I think it will present the more important matters of the I. & G. N.'s contention. I am very sure you do not object if you can save time by doing that, as it enables you to follow the principal idea.

Thereupon, Mr. Dabney proceeded to read the written statement referred to, which was as follows:

"Houston, Texas, June, 1915.

To the Honorable State Tax Board, Austin Texas.

GENTLEMEN:

The International & Great Northern Company is in the hands of receivers. Your notice of May 17th, 1915, was addressed to that company. In it, you state that you have assessed 'the true value of its franchises and intangible properties in or held within the State' to be $13,493,200.00 and that you have ascertained the true value of its physical and tangible properties within the State to be $30,444,833.00, and 'the true value of the entire property of said corporation within the State of Texas' to be $43,938,033.00.

Your notice states that the International & Great Northern Railway Company is required to show cause, if any it has, why the valuation should not be made final and the apportionment to the different counties which you make thereof.

Since the issue of this notice, our Mr. King has seen the Honorable A. P. Bagby, Jr., a member of your Board, and State Tax Commissioner, and he has reduced his calculations, whereby he reduces the intangible valuation to $10,733,223.00.

Commissioner Bagby in this supplemental statement puts the true value of the whole property at $39,116,033.00, and deducting therefrom as physical value $28,372,810.00, leaving as intangible value $10,743,223.00.

(1) Attached hereto as Exhibit "A" and "B", are copies furnished us by Commissioner Bagby, "A" being a statement of the calculation as finally made by him, or him and yourselves, and "B" being a statement of the calculation as first made by yourselves.

In your first calculation, the mortgage debt at par was taken as $31,003,500.00, being an error corrected in the second calculation to $26,181,500.00. You added this mortgage debt in as the largest item to arrive at the aggregate value of the property. Your other item in both calculations is $12,934,533.00, which when added to the mortgage debt at par, as corrected by yourselves, makes your statement of the aggregate value in both calculations, the

fact of $12,934,533.00 remaining constant. This being the case, we do not comprehend why the physical value in the second calculation should be reduced to $28,372,210.00.

Taking your statement of the true aggregate value as finally stated by yourselves at	$39,116,033.00
There should be deducted therefrom your statement of the physical value	30,444,833.00
There would then remain	$8,661,200.00

This last remainder would seem to be what was intended by the last calculation, instead of the larger sum.

(2) Having reference to Exhibits "A" and "B" furnished to show the Board's system of valuation, we respectfully request the Board to explain to us why that method of valuation was adopted. Our total capitalization is stated to be $31,003,500.00. We respectfully request the Board to explain to us the remaining elements in the calculation, why a ratio of the T. & P. was adopted, and the method of applying that ratio. We have made earnest efforts to understand the Board's method. We request the Board to explain to us the basis it has pursued.

(3) The amount of the capital liabilities, outstanding stock and bonds of this railway, is $31,003,500.00. Certain salient conditions existed at the beginning of the year and now exist:

On the tenth of August 1914, the railway fell back into the hands of receivers, the properties all having been sold out and a prior receivership closed in September, 1911. The Board now takes the position that the properties are worth over $8,000,000.00 than its total capitalization. There are but two methods recognized in the books for the ascertainment of the values of intangibles.

182 They are:

(*a*) Add together the value of the stocks and bonds and deduct the value of the tangibles.

(*b*) Capitalize the income at a reasonable rate of interest locally obtaining.

It is made the duty of this Board to pursue the first method in so far as 'the other evidence and information adduced before said State Tax Board does not make it appear to the members of said Board to be improper or unjust to do so.' (R. S. 7420).

This Board has not pursued that method, as is shown by your calculation, nor has it pursued the method of capitalizing the income, yet the first method is incumbent upon the Board, unless you are necessarily swayed from it by other evidence and information adduced before you.

What other evidence has been produced before this Board? What

efforts has this Board made to ascertain the true aggregate value of the stocks and bonds?

We request the Board to now state to us, for the Board will not, of course, proceed upon a basis of evidence known to it alone. Such would be a violation of our most fundamental rights and prevent us from correcting any error into which the Board has fallen.

Let us deduct the capital stock (4,822,000.00) from the $31,003,-500.00. There remains then of bonds, including receivers' equipment certificates and equipment notes, $26,181,500.00 as the amount of the capital liabilities, exclusive of stock.

The road has paid interest at six per cent on its first mortgage gold bonds amounting to $11,290,500.00, but its last, or its semi-annual interest (May 1st, 1915) had to be made by the issue of receivers' certificates. Its second mortgage, known as its first refunding mortgage, has been foreclosed by the decree of the Federal Court, and its properties ordered sold. Its interest thereon was in default when the receivership was taken out, and has remained in default ever since. These second mortgage obligations, known as the first refunding bonds, bear five per cent interest only, and aggregate,
counting only the gold notes secured on the greater part
183 thereon, and not the bonds themselves for the security of the
same, only $13,641,000.00. It is apparent that not only is the road not paying income on the capitalization of $31,003,500.00, but that it is absolutely in default on $13,641,000.00 and in the process of being sold out for such default.

The calculation of the Board takes the mortgage debt at par, and yet $13,641,000.00 of that is in heavy default.

It results from your calculation that you value $4,822,000.00 of stock of this road, against which there is a judgment of foreclosure, not at a discount, but at the enormous premium of the difference between your par valuation of the stock and $12,934,533.00, or deducting the par of the stock $4,822,000.00, it results that you value this stock at a premium of $8,112,533.00 at the very moment when this stock is foreclosed, which is in the process of being extinguished and thrown into the waste basket, and when we presume it could be bought on the market at a price so low as to be purely nominal, if saleable at any price whatsoever.

The I. & G. N. Railway Company has paid no dividend whatsoever, except for one year 1912 on its preferred stock, a very small amount, which will be shown by our auditor in his evidence. Whether or not the old sold out I. & G. N. Railroad Company ever paid any dividends, we are not at this moment informed. As far as we know, it never paid any in its history. If it ever paid any, it was for negligible quantities.

In 1910 the old railroad was foreclosed on its second mortgage bonds of 1881, for in round numbers $12,000,000.00. It had then stock outstanding for an amount greater than the present stock. The property was sold under this foreclosure decree; the old company died, choked by its insolvency, and the stock was then worth nothing, and yet after the lapse of less than five years, the Board has, in a preliminary way, concluded that the stock of the present corporation

its worth $12,934,533.00. We cannot believe that the Board had the facts before it.

184 (4) The Railroad Commission valuation of the I. & G. N. Railway property is $32,471,027.05, and there are additions and betterments claimed by the road not yet valued, of $1,542,065.02, making a total of $34,013,092.07.

These are stated to be physical valuations in Exhibit "C," hereto attached. That statement is to be taken with the qualification that it is the practice of the Railroad Commission to add to its valuation a so called franchise valuation of six per cent, which has been done and absorbed into the Railroad Commission valuations given above.

It results from the above, that while this Board has stated a valuation of $43,938,033.00 as the proposed valuation of the railroad, afterwards corrected to $39,116,033.00, yet the Railroad Commission has valued the property only at $32,471,027.05, to which there are additions and betterments not yet valued as stated above, and on which valuation the road cannot make income, that is, not on the Railroad valuation, and is heavily in default as appears above.

The Railroad Commission of Texas is required by law to value the road, and has done so. It is required to make this valuation with reference to the issue of stocks and bonds and the making of rates with the direct purpose of preventing income being realized from the road in excess of the Railroad Commission valuation, and the income is realized far below that valuation. If the I. & G. N. Railway Company is not permitted to make an income on more than the Railway Commission valuation, and the rates are fixed by that Commission, as we all know, so that the income shall not be in excess, then it is impossible that the properties can, in value, exceed the Railroad Commission valuation, assuming that the Commission is legal in its action. No property can be worth more than a value founded on the average of its income.

We submit that to limit the income on this property to an income on a capital of a little over $34,000,000.00, and then to value it for taxation at the rate of $39,116,033.00 is a manifest illegality,
185 much added to when we consider the fact that the income of the railway is insufficient to take care of anything like the Railroad Commission valuation.

We do not mean to admit that the tariffs are correct, but it is our duty to call attention to the immense conflict between the position of this Board and that of the Railroad Commission of Texas.

(5) We attach hereto as our Exhibit "C," a statement of the capital stock, mortgage, bonded and secured debt—par value—outstanding, and analysis of physical value by the Railroad Commission valuations which, as we have shown above, include an item of six per cent, called franchise valuation, etc. An examination of that sheet will show that there are no intangibles whatever, and indeed that on the Railroad Commission's valuation, the intangibles are all nonexistent or in the red, as shown by the difference between the capital liabilities and values made and to be made by the Railroad Commission.

(6) We will now consider the other way of arriving at intangibles, that is, by capitalization of income. To that purpose, we attach hereto Exhibit "D."

Assuredly in Texas, seven per cent would not be an excessive rate at which to capitalize income. We have taken the three calendar years of 1912, 1913 and 1914. We have aggregated the various items of gross income for those calendar years, and we have also aggregated the items of operation for each year, not charging off anything, however, for interest or income on capital. The year 1912 was the banner year, we believe, in the whole experience of the I. & G. N. Railway Company. It was the time when that road paid a dividend for one year on its preferred stock. Its net income without deduction of anything for return on investment in the way of either interest or dividends, was $2,084,149.50, which when capitalized at seven per cent, would make a capital investment of $29,773,564.28, an experience never before equalled in the experience of the railroad.

186 For the year 1913, the net income was $1,156,660.92, which capitalizes at $16,523,727.43. For the year 1914, the net income was $65,405.27, which capitalizes at $934,361.00.

We request a careful consideration of these figures. The taxes paid by the I. & G. N. Railway for 1914 was $370,255.83, while the net income for that year was $65,405.27. The increase in taxation is frightful, and averaging over a considerable period of years, grows by leaps and bounds. How can a property which yielded in 1914 only net $65,405.27, be taxed at approximately $40,000,000.00, when that income capitalizes less than $1,000,000.00.

(8) We earnestly request this Board to now state at this hearing on what basis it proceeds or proposes to proceed. If it is valuing the stocks and bonds, then we respectfully request the Board to so state. If it is not valuing the stocks and bonds, then by the statute it is required to have reasons for not valuing them, and we respectfully request the Board to so state. If it is capitalizing the income, the Board has been much misinformed, for on that basis, nothing like the Railroad Commission's valuation can be reached.

(9) The old I. & G. N. Railroad was sold out in 1910-1911. Its capital stock was $5,834,594.00 in excess of the capital stock of the present railway, and the approximate amount of $10,000,000.00 of capital stock died by that foreclosure. The experience of that railroad was in many respects disastrous.

That railroad properties in Texas should have a greater value is, of course, without dispute, but we now face actualities, not theories, and the long continued and unfortunate experience assuredly shows that this is no time to suppose the existence of values and property when such suppositions have no foundation whatever in any practical or legal theory.

We have not undertaken to discuss what are the physical valuations of the I. & G. N. Railway Company, nor do we admit the correctness of any mentioned. The duty of this Board is to fix the value of the intangibles, if any there are, deducting the physicals,

but we do now say that on no conceivable theory and that by
187 no legal formula can the intangible values be discovered, which are claimed. The books of the I. & G. N. Railway Company are open. On interstate business, it receives the best end of the divisions. Our request, therefore, is that the Board should carefully analyze the situation, derive from ourselves and every other source the fullest information, and then proceed on some careful and correct legal theory.

It is a well known fact that property all over the State is not valued at its market value, but generally far below, and that immense proportion escapes all taxation. Your valuations when certified to the assessors, go upon the books dollar for dollar. The unequality is manifest and gross, and while this Board is required to do its duty without regard to the breaking of the law by others, yet the mere fact that doing its duty will lead (where there are intangibles) to the operation of a great injustice, the existence of this undoubted situation imposes the necessity of the utmost care not to create fictitious properties and not to say that that exists which does not exist.

There are many other grounds upon which we protest against the proposed valuations. It is impossible to go into them all at this time, but they are of the most serious character.

Your jurisdiction rests against 'every individual, company, corporation or association doing business in this State' of the character of railroads, ferries, bridge companies, turnpikes and toll companies. We now respectfully protest that the proposed valuations are utterly out of line with other valuations of intangibles.

In making this answer, we do not waive our contention as to the illegality and unevenness of the proposed valuation, nor do we admit the existence of any intangibles whatever.

In connection with this statement, we submit testimony which we trust will be a very great aid to the Board.

Very respectfully,

JAS. A. BAKER AND
CECIL A. LYON,
Receivers of the International & Great Northern Railway Company.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY,
188 By WILSON, DABNEY & KING,
Their Attorneys."

Mr. Dabney: Now Gentlemen, I will invite your attention to the testimony of Mr. Werner, who is auditor for the Receivers of the Railway Company. Does the Board desire Mr. Werner to be sworn?

Commissioner Terrell: I don't care for it.

Mr. Dabney: We want his testimony to have the force of testimony under oath.

W. J. WERNER, called as a witness on behalf of the protestant, I. & G. N. Railway Company, on examination by Mr. Dabney, testified as follows:

Q. Now Mr. Werner, you gave me a memorandum—this is it—of the taxes actually paid by the I. & G. N. for the years 1910 to 1914 inclusive?

A. Yes sir.

Q. Will you just read that to the Board?

A. Taxes paid by the I. & G. N. for the calendar year of 1910, $259,508.15; for 1911, $305,890.83; for 1912, $296,017.20; for 1913, $370,520.50; for 1914, $469,903.60.

Mr. Dabney: Just put this statement with your papers.

Chairman Bagby: All right, sir.

Q. Now Mr. Werner, it is a fact that the I. & G. N. has been recently foreclosed in the Federal Court, is it not, and a decree of foreclosure entered?

A. There has been a decree of foreclosure entered.

Q. The property has not yet been sold?

A. The property has not been sold yet.

Q. That was a foreclosure of the first refunding mortgage bonds, really the second mortgage on the properties, was it not?

A. The I. & G. N. Railway Company's first refunding mortgage bonds.

Q. I will now ask you to take a statement, a copy of which is appended to this statement we will leave with the Board,
189 showing capital stock, mortgage, bonded and secured debt, par value, etc.,—is the statement which you have there and which we will leave with the Board, identical with this marked "Exhibit C" in the statement I have read to the Board?

A. Yes sir.

Q. Well the capital stock is, as shown in your statement, is it not, $4,822,000.00, in the statement that was made to the Board heretofore?

A. That is correct.

Q. Does that include common and preferred?

A. Yes sir.

Q. Do you remember how much of that was common?

A. $1,422,000.00.

Q. The balance was preferred—now was there ever any dividends paid on that preferred stock?

A. Yes sir, there was a dividend of five per cent paid.

Q. Paid what year?

A. During the fiscal year ending June 30th, 1912, if my recollection serves me correctly.

Q. Yes—was there ever any other dividend paid in the operation of the present railway company?

A. According to the records in my possession, there was not.

Q. Well have you been connected with the present railway company organized in 1911, since its organization?

A. O, the present railway company—no sir.

Q. Now, were there any dividends ever paid by the old I. & G. N. Railroad Company, sold out in 1911?

A. No sir, not according to the records in my possession.

Q. Yes—can you remember approximately the amount of bonds wiped out by the foreclosure of 1910-1911?

A. The second mortgage bonds.

Q. The second mortgage bonds were taken up in the purchase of the property—well now that was——

A. $10,300,000.00, I think.

Q. With interest added——

190 Mr. Dabney: Now that was taken up in the purchase of the property, and I know, Gentlemen, that that was paid, except a small deficit, by buying the property in.

Q. The third mortgage bonds, what became of them?

A. That was wiped out in the sale.

Q. How much was that?

A. I don't remember exactly, Judge, but I think it was approximately $3,000,000.00.

Q. Yes—now the floating indebtedness, do you remember how much that was, unsecured by liens, that was wiped out in that sale?

A. Between $5,000,000.00 and $6,000,000.00.

Q. And the capital stock wiped out by that sale was approximately $11,000,000.00, or do you know—or $10,000,000.00?

A. My recollection is it was $9,755,000.00, total stock wiped out.

Q. Now in your statement here, you state that the total capitalization of the I. & G. N., including equipment notes, is $33,154,000.00, all of which are secured by liens, except the amount of this stock, is that correct?

A. Yes sir, that is correct.

Q. Then down here I notice you have made a deduction as to the intangible values and marked a deficit, that the intangibles instead of existing on December 31st, 1914, are represented by a hole in the wall to the extent of $1,859,092.07. Please explain to the Board how you made that deduction? Was it just to make a deduction?

A. Do you mean how I made that red figure?

Q. That estimate, yes?

A. That was by taking the total stocks and bonds outstanding at their par value, which amounted to $32,154,000.00, and deducting therefrom what I called the physical values of the railway, made up by the Railroad Commission of Texas valuation of $32,471,-527.05, plus additions and betterments not yet valued by the Commission.

Q. Yes?

191 A. In the amount of $1,542,065.02, making a total physical value of $34,013,992.07, leaving the intangible value in the red, $1,859,092.07.

Q. Yes, and I notice you have made a similar calculation for 1913 and 1912, making the deficits smaller for those years?

A. Yes sir.

Q. We need not go over that, they are here in the statement?

A. The same formula was followed.

Q. Yes, the same formula was followed—now did you follow that formula to determine whether any intangibles existed or not, partly

or wholly on the basis that the road could not pay interest on its $32,000,000.00 capitalization?

A. I do not understand your question, Judge.

Q. Well just to explain, I suggested that you followed that formula on the theory that intangibles could not exist whether there was a physical valuation of $34,000,000.00 and when the railroads could not pay income on the capital account of $32,000,000.00?

A. Yes sir.

Q. That is your theory, is it?

A. Yes sir.

Q. And I think it is a very good theory?

A. That is one formula that I understand to be correct in the intangible tax law.

Q. Yes—now you have an analysis of the physical valuations here which I will not go into the *defailts* of, but I want you to state, are those copied, are those items which are correctly copied from the Railroad Commission valuations?

A. Yes, they are taken from certified copies of the Commission's valuations, valuation orders, as stated on that statement.

Q. Yes, the rest is a matter of analysis which we will leave before the Board and we will not go into it.

Commissioner Terrell: Did I understand you to say in your figures for 1913 and 1914, you failed to find any intangible value?

192 A. According to that formula, there was no intangibles.

Commissioner Terrell: Did the Board find any?

A. Yes sir, they found one.

Chairman Bagby: $13,000,000.00, wasn't it, Judge?

Mr. Dabney: Approximately, and I beg to state, Gentlemen, that that Board would never let us know, we never knew what the formula was. I believe one member of this Board was on it, were you on it?

Commissioner Terrell: No.

Mr. Dabney: No member of this Board—and this Board has treated us with a very much fuller explanation as to how they stood than any Board yet. It is the first time we have ever been able to manage to get together with the Board to follow what process they followed. This is simply, I may state, Mr. Werner's theory here, which is absolutely correct for you on the basis of income—no, this is not the capitalization of income—if you take the aggregate of the stocks and bonds, we have shown that the aggregate of these stocks and bonds could not be worth as much as par, because the road being foreclosed and enormously in default, and its whole history shows that. Consequently, the aggregate of its stocks a*b*d bonds are far below the aggregate of the physical valuations made by the Railroad Commission, so it is impossible on that theory. That is the theory that the statute requires you to follow, if you can, that there should be any intangibles. I just want to show here—of course we know as a common sense body of men, looking at the thing justly and rightly, that to suppose the stock of the I. & G. N. is at a premium of $8,000,000.00, which I imagine is purely a matter of oversight in

calculation, growing out of a wrong theory applied to our road, is a myth, and that cannot be written down under anybody's signature after it is gone into.

Commissioner McKay: What was its value last year?

Chairman Dagby: Between $13,000,000.00 and $14,000,000.00.

193 Mr. Dabney: That is true. This Board is putting it less than that.

Chairman Dagby: By $3,000,000.00.

Mr. Dabney: It was so then, it is more so now. We have reached a period in our income——

Commissioner Terrell: Your deduction, however, Judge, existed then as it does now?

Mr. Dabney: Yes sir.

Commissioner Terrell: There were no intangibles then?

Mr. Dabney: There were no intangibles then, and it is worse now. I did not give the figures here. As stated Mr. Werner applied the same formula. There was—instead of being an intangible, there was a deficit of $1,043,000.00 in 1913, and $-,069,000.00 in 1912. It has not been acquiesced in, Gentlemen. We filed a protest every year, which you will find in your files. While we have submitted to it, it does not mean that we have acquiesced in it as in any respect correct.

Now we have here a statement of the gross income, which we have attached. It is the last exhibit shown, and I would like for you particularly to look at the income of the I. & G. N. Railway, from which we have met operating deductions, including taxes, and given you three years' experience. There were two ways recognized in the books of getting at this thing. One was adding together the value of the stocks and bonds, and the other is capitalizing the income. The first, you are compelled to follow by the statute, if you justly can. The other is the only other conceivable logical way of getting at it.

Q. Now we have here the gross income of the I. & G. N. Railway Company, itemized for the calendar year of 1914, the aggregate amount of $9,655,398.41——

A. $9,656,398.41.

Q. $9,656,398.41, yes—that is correct, is it, Mr. Werner?

A. Yes sir, according to the books.

Q. Now this Exhibit D attached to the statement we are leaving with the Board, is that correct?

194 A. Yes sir, that is correct.

Q. Made up under your direction, in your office?

A. Yes sir.

Q. The whole of it?

A. Yes sir.

Q. Then state, Mr. Werner, whether in making the operating deductions, you deducted from the gross income here any interest or dividends?

A. No interest or dividends, except possibly a few dollars interest on some delayed accounts, not bonds.

Q. Well will it amount to $1,000.00?

A. No, it wouldn't amount to $1,000.00—a few little operating charges.

Q. In other words then, in the deductions from the gross income, you have deducted nothing from the hire or income on capital whatever?

A. Absolutely nothing.

Q. Except less than $1,000.00?

A. Well I do not consider that is on the capital.

Q. Yes, all right—then having made that deduction, what was the net income of operation of the I. & G. N. Railway Company for the calendar year 1914?

A. $65,405.27.

Q. Is seven per cent, from your knowledge of things in Texas, an excessive rate of interest in Texas?

A. No sir, not according to my——

Q. Knowledge?

A. Knowledge.

Q. It is a moderate rate, I mean the custom of the country?

A. Yes sir.

Q. And what is charged—capitalizing the net income of the I. & G. N. without any deductions for hire of capital for 1914, what do you get the value of the railway?

A. $934,361.00.

Q. Now take the experience for 1913, state what was the
195 gross income for that year?

A. Gross income, $10,910,568.10.

Q. State what were the operating deductions, all deductions made for operating, less compensation for hire of capital?

A. Total operating deductions, not including any hire of capital, $9,753,907.18.

Q. Now what was the net income?

A. Net income, $1,156,660.92.

Q. Now capitalize that at seven per cent, and what would you get to be the value of the property?

A. $16,523,727.43.

Q. Now take the year 1912, the calendar year, and state the total gross income?

A. Total gross income, $11,581,166.61.

Q. And total operating deductions, not including hire of capital?

A. Total operating deductions, not including hire of capital, $9,497,017.11.

Q. And net income?

A. Net income, $2,084,149.50.

Q. And capitalized at seven per cent, what would be the value of the road on that capitalization?

A. $29,773,564.28.

Q. What was the banner year of the I. & G. N. Railway?

A. According to the records in my possession, the fiscal year 1912 was the banner year.

Q. Fiscal or calendar year?
A. Either one.
Q. Either one?
A. Fiscal or calendar.
Q. Now the I. & G. N. as it now exists, was organized in 1911—the old railroad whose properties have passed down to the new railway, did it have any year as good as the year 1912?
A. No sir.
Q. According to your records?
196 A. No sir, there are no records in my possession that show its earning capacity was ever equal to that of 1912.
Q. How long have you been connected with the auditor's general office of the I. & G. N. Railroad or Railway either?
A. My connection with the immediate office, that is, my employment with its office?
Q. Yes, sir.
A. It is since December, about December 1st, 1911.
Q. What is your experience as to the increase of taxation, Mr. Werner?
A. My records indicate a gradual increase on the total tax payments since the year 1900.
Q. What?
A. I looked for the records the other day.
Q. Do you happen to know what they were for the year 1900?
A. For the year 1900, our total tax payments, according to my recollection, amounted to approximately $47,000.00, but during that period there was a portion of our line exempt from taxes, from taxation.
Q. There wasn't as much constructed then?
A. No, there was only 772 miles in operation at that time, During that year, after our 772 miles of line got in operation, we paid approximately $70,000.00.
Q. Well Mr. Holder has those figures and will go into that and I won't ask you about that—now you have here, Mr. Werner, a detail of additions and betterments—please explain to the Board what they are—let me ask you, are those additions and betterments in addition to the Railroad Commission valuation or included in it?
A. No sir. A portion of this has been valued by the Railroad Commission.
Q. Well I don't care to go into any of it, except that it is additional to the Railroad Commission valuation?
197 A. I cannot give you that from this statement.
Q. No, but you have got it in these sheets here, have you not?
A. Yes, sir.
Q. All right then, we will not go into it——
A. That statement just represents the monthly charges for additions and betterments.
Q. Yes?
A. No deductions were made there for the valuations of them.

Q. Mr. Werner, what is the expense and the gross expense of the legal requirements—I will ask you just so we can get it in the record—what would be the expense to the I. & G. N. of the bimonthly pay day instead of the monthly pay day?

A. That will cost us approximately $12,000.00 a year.

Q. Extra bookkeeping?

A. Extra bookkeeping and clerical hire.

Q. What will be the expense to you of the new requirements of the Interstate Commerce Commission in regard to the analysis of the passenger earnings?

A. Do you mean the separation of the operating expense between freight and passenger?

Q. Yes?

A. We estimate that will cost us between $8,000.00 and $10,000.00.

Q. Per annum?

A. We haven't received the final classification yet.

Q. Well in asking about those two, I just want it to be typical—what is the course of your experience as an auditor the last few years, as to these additional governmental requirements of inspection?

A. Constant increase.

Q. And reports?

A. A constant increase in our clerical force in the last three or four years on account of getting statistics and requirements.

Mr. Dabney: Gentlemen, I would like to ask Mr. Booth a very few questions.

198 H. BOOTH, called as a witness on behalf of the protestant, I. & G. N. Railway Company, on examination by Mr. Dabney, testified as follows:

Mr. Dabney: Mr. Booth is the head of the Traffic Department of the I. & G. N. Railway Company for its receivers.

Q. Mr. Booth, I would like for you to state to the Board in your own way the best you can, why the revenues of the I. & G. N. Railway Company, the net revenues have been declining, and what are the permanent elements or the elements that have a considerable operation for a considerable length of time in making for their decline?

A. Well one of the causes for it is the purchase of the connecting lines, feeders, by competing lines. I refer particularly to the purchase of the Texas Central by the M. K. & T., the purchase of the Wichita Falls & No-thwestern by the M. K. & T., the purchase of the Houston & Brazos Valley by the M. K. & T., the purchase of the Beaumont & Great Northern by the M. K. & T., and the absorption of the Hearne & Brazos Valley by the H. & T. C. All of these lines were valuable feeders. They have been acquired by purchase or by consolidation by competing railroads which has deprived us of very valuable tonnage. In the second place, the building by the H. & T. C. of the Giddings cutoff from Hearne to Giddings, making close connections to San Antonio, which has deprived us of very valuable

livestock tonnage from points on the Southern Pacific west of San Antonio, besides increasing our competition at San Antonio and from connecting lines at San Antonio. And another very important factor is the revolutionary conditions in Mexico which have practically destroyed our Mexico business. Our loss in earnings on that business alone will amount to approximately $1,000,000.00 a year, and has for the last several years. Another reason is the increasing tonnage of the low-class commodities, such as stone, sand and gravel, lignite and fuel oil, on which the revenue is very small,
199 possibly hardly covers the cost of operation; and the decrease in the high-class tonnage; the reduction by the Railroad Commission of the rates on these low-class commodities, particularly stone, sand and gravel, and the reduction or rather the increased cost of switching service by reason of the rules of the Railroad Commission which require—now require the absorption of it on noncompetitive traffic, which did not exist until about twelve months ago. I believe those are the principal factors.

Q. How is the factor of increased cost of service and labor—do you regard that as a permanent factor?

A. Not only these factors that I have mentioned, not only have they decreased our operating revenue, but the other influences have increased our operating expenses—the increased cost of labor. And then our railroad occupies a territory that is subject to overflow and flood damage, which has very materially increased our operating cost, the cost of maintenance.

Q. Can you remember, Mr. Booth, mentioning the overflow in which our General Manager, Mr. Martin, lost his life, in 1913, I believe it was——

A. Yes sir.

Q. Do you remember in round figures what that cost the railroad in repairs and loss of traffic?

A. My recollection is that the physical damage——

Q. Yes sir?

A. Amounted to about $250,000.00, and we estimated that the loss of traffic on account of washouts, amounted to that much more, or perhaps even greater.

Q. Now have you confronted such conditions this year?

A. Yes sir.

Q. Can you give me any estimate of the loss?

A. The physical damage this year, my recollection is, amounted to about $120,000.00. I have made no estimate of the loss of traffic, but I think it was even greater than it was last year, because
200 we were washed out in more different places. It came at the season of the year when it hurt us worst. From all these causes which I have mentioned, I would say that the income value of the property has depreciated instead of increasing.

Q. Yes?

A. Within the past few years.

Q. And a number of them seem to be of a permanent character?

A. Yes sir.

Q. In the operation?

A. Yes sir.

Q. The increase of taxation has been testified to by Mr. Werner—is there anything else you desire to state?

A. No sir, I believe not.

Q. The rates on cotton, have they been decreased?

A. Yes sir.

Q. Well just state in a very general way without going into par ticulars?

A. Well cotton is one of our principal items of tonnage, and th rate on that commodity was decreased five cents per 100 pounds, an my recollection is that that reduction cost us about $50,000.00 i earnings.

Q. The I. & G. N. is the largest cotton carrier, I believe, in thi State?

A. Yes sir.

Mr. Dabney: That's all, I believe. Is Mr. Holder here?

Chairman Bagby: Gentlemen, I suggest we adjourn until afte dinner.

Mr. Dabney: Gentlemen, I have one witness, very, very brief, bu I desire to have a conference——

Commissioner Terrell: We can finish up this afternoon just a well.

Mr. Dabney: We can finish up this afternoon just as well

201 Commissioner Terrell: I move we adjourn until tw o'clock. (Motion carried and adjournment taken.)

Friday Afternoon,
June 18th, 1915—2.20 p. m.

W. J. WERNER, recalled as a witness on behalf of the protestant I. & G. N. Railway Company, on further examination by Mr. Dab ney, testified as follows:

Q. You have no statement here, I believe, of your experience, ru by months of the present fiscal year, the statistics relate to the las fiscal year?

A. The last calendar year.

Q. The last calendar year and prior years, but please state to th Board what has been the business, in a general way, of the railwa since the first of last January?

A. From January 1st until April—that is the last month in whic we have our general accounts closed, we will show an operating defi cit of about $130,000.00, that is, not deducting any interest or cap ital charges.

Q. No capital charge to the stock—state for the corresponding period a year ago?

A. I don't remember how that compares with the same period, bu I am inclined to the opinion that it is considerably worse.

Mr. Dabney: That's all.

Mr. HOLDER, called as a witness on behalf of the protestant, I. & G. N. Railway Company, on examination by Mr. Dabney, testified as follows:

Q. Mr. Holder, have you a statement there, showing the amount of taxes paid by the I. & G. N. from year to year, commencing say about the year 1893?

A. I have it, Judge, from 1900.

Q. You have it from 1900?

202 A. Yes sir.

Q. Do you remember what year exactly the tax exemptions on the I. & G. N. expired?

A. I think it was 1900.

Q. 1900, all right—I want to commence after those tax exemptions expired—just read to the Board, please, sir, the amount of taxes paid from year to year?

A. 1900, $59,626.18; 1901, $103,391.30; 1902, $106,622.22; 1903, 121,157.90.

Q. Now just stop right there—in 1903, the Fort Worth division was substantially completed, was it not?

A. I think it was about 1903. 1904, it was completed, I think, Judge.

Q. Well since 1904, there has been no addition to the I. & G. N. Railway's trackage, has there, except the Oak Lawn at Houston?

A. 1904, we had the same mileage then we have no-.

Q. All right, go ahead?

A. 1904, $127,304.81; 1905, $138,841.78; 1906, $173,592.63; 1907, $271,674.30; 1908, $241,596.30; 1909, $253,995.75; 1910, $250,031.78; 1911, $304,180.57; 1912, $311,909.88; 1913, $376,-630.11.

Q. And what has accrued for the present—no, 1914?

A. 1914, $371,439.36. Now that includes the franchise, and for 1914, miscellaneous for $1,278.84, on the Bonner lands and the I. G. N. Hospital.

Q. Yes sir?

A. And that is included in each one of those amounts. It is only a small item. That would account for the difference between the amount I show and the amounts you showed this morning.

Q. Yes, I only showed for three years?

A. Yes, there is the same difference.

Q. Have you evidence of the tax accruals for the present year?

A. Well, no sir. You see we haven't got far enough to estimate that.

203 Q. Now, Mr. Holder, there is a statement there—one of the Gentlemen called attention to, with regard to the actual values of the physical property of the I. & G. N. Railway Company, exclusive of rolling stock. Now those values there show the same thing, the total Railroad Commission valuation but the rolling stock—the Railroad Commission valuation includes the rolling stock—you know that, don't you?

A. Yes sir.

Q. So after adding the rolling stock on, if you wish to make any

further explanation of how that statement is made out, I wish you would do so?

A. Well that is the tax statement. The auditor's office furnishes the greater part of the information contained therein, but there is certain parts that it is necessary to be furnished by my office, and this physical valuation which is included in this report, was furnished by my office. The statement was made by a clerk that has been employed in my office for about fifteen years, and in making the statement, the clerk seems to have taken the figures mechanically that were used for the last several years. Well I notice they use the same figures that we used for 1912, which did not include the additions and betterments that have been allowed by the Railroad Commission in the last few years, in recent years, and the statement does not show the true physical condition—true physical valuation. I did not—I had only been in the office for a short time when the statement was made, and the same clerk has made the previous statements, and I did not detect the error—well until perhaps two months ago.

Q. Yes sir?

A. And I called attention—I called Judge King's attention to it when I discovered the error.

Q. After the report was made?

A. After the report was made and sent in.

204 Q. That would be an error—O- well, after adding the rolling stock?

A. O-, there would still be considerable difference.

Q. Yes, below the Railroad Commission valuation?

A. Yes sir. The same physical valuation as shown, is about the same as shown for the past four years.

Q. Yes sir.

A. Which does not include the additions and betterments which have been allowed by the Railroad Commission——

Q. Yes sir?

A. During that time.

Mr. Dabney: We have made a supplemental statement to the Board, which brings all of that down to date, Gentlemen of the Commission, so that you will have the whole matter before you——

Q. And this report does not include that.

A. Mr. Dabney: Which goes beyond the Railroad Commission valuation, including rolling stock and everything. That is the only testimoney, Gentlemen, that we have, I believe. But before I close, I wanted to go over the Board's theory of assessment of the I. & G. N. properties. It is the first time within our experience, that the Board has given us a theory. We think the Board is exactly right, that it is due ourselves and due the Board, that the formula for making these taxes should be expressed. I do not mean to say that the same formula would have to be used on each road, because the statute expressly indicates that it might not be the same formula. The statute states the formula that this Board must use, with the exception that if it be impracticable to use its general formula in a particular instance, you can resort to another basis. As I have explained,

there has been only two approved methods of doing it—one to add the value of the stocks and bonds, and the other is to capitalize the income. Now we have tried very hard to understand this formula, and before we close, in order that we may explain some other things which will be necessary in connection with this formula, we
205 would like for the Board to explain to us a little of its basis.

Now I understand it is gained by aggregating our gross receipts for four years, dividing that by four, which would give of course, the average of the four years' gross receipts. Then aggregating our bonds and stocks as our total capitalization. Then our average gross receipts for four years is divided by the total capitalization to give our ratio of 33 53/100. Then that is followed by the ratio of the T. & P. of 12½%, and then the 33 53/100 per cent. the ratio of the I. & G. N. is divided by the 12 5/10, when we get the figures of 268.24—that is a mistake, I suppose, Mr. Bagby, meant for 2.6824, is it not?

Chairman Bagby: Yes sir.

Mr. Dabney: The decimal is simply placed wrong. That did not mislead us at all. Then our capital stock is multiplied by 2.6824, and our capital stock valued at $12,934,533.00, or a premium of over $8,000,000.00——

Mr. Holder: $8,000,000.00, isn't it, Judge?

Mr. Dabney: A premium of $8,000,000.00. In other words, the Board is of the opinion, in this preliminary estimate, that the capital stock of the I. & G. N. which is par $4,822,000.00, is worth a premium of over $8,000,000.00. Now, I do not—we submit on the facts before the Board, and I imagine every member of the Board will agree with us at once that that is an error. But the matter that we do not understand is this, that why in order to get a ratio, our capital stock should be divided by our average gross income for ten years, and if Mr. Bagby would inform us what his theory in doing that was——

Chairman Bagby: I beg your pardon, what was that, Judge?

Mr. Dabney: We will be obliged.

Chairman Bagby: I capitalized the gross receipts, Judge.

Mr. Dabney: Yes sir.

Chairman Bagby: I took the capital stock and divided it into the gross receipts——

206 Mr. Dabney: Yes sir.

Chairman Bagby: And got the ratio of the gross receipts to the capital stock.

Mr. Dabney: I understand that. Now my question is, why should the ratio between the capital stock and the gross receipts be a factor or an element in solving the problem?

Chairman Bagby: We just take that as a basis, Judge, to go by.

Mr. Dabney: Well in that connection, it has been completely shown here, that our gross receipts have no logical relation to our income. For instance, at least the relations are very misleading. Now our gross receipts for 1914, $9,600,000.00 and odd dollars—our net income for 1914, without deduction of anything for capital charges, was between $60,000.00 and $70,000.00. Then I want it, I think in

our record, Gentlemen, how that was derived. Then my next question which I would like to have the Board explain, is why—I do not mean to be wearisome—but I want to meet the position of the Board, and how can I unless we get our minds together—why the ratio of the T. & P. of 12½ was used by which to divide our ratio so as to get 2,6824? I want to follow the process of reasoning of the Board.

Chairman Bagby: We took the T. & P. as the best railway company of the State as a basis to go by for several reasons, Judge.

Mr. Dabney: Yes sir—well if it isn't objectionable of course having no legal formula of course as a basis of this matter and we will all want the legal formula I would like to get those reasons?

Chairman Bagby: Why I would like to confer a little with the Board before I answer the question.

Commissioner McKay: I think it would be well for you to explain to him your reasons.

Chairman Bagby: Just a second, Mr. McKay—I don't mind stating my reasons, but I just wanted to tell you——

207 Commissioner McKay: Yes sir. (Chairman Bagby and Commissioner McKay confer.)

Chairman Bagby: All right now, Judge, if you will ask the question, I will answer it.

Mr. Dabney: Yes sir—I want to know the reason for the adoption of 12 5/10 as the ratio of the T. & P.——

Chairman Bagby: You wanted to know how I happened to find the 12½ per cent ratio?

Mr. Dabney: Yes sir.

Chairman Bagby: Judge, I got the T. & P. report for four years back. They quoted their stock for four years in the report they made to the Tax Commissioner, and that averaged sixteen cents.

Mr. Dabney: You mean the value of the stock?

Chairman Bagby: I mean the value of the stock.

Mr. Dabney: The market value?

Chairman Bagby: The market value, yes sir. The first day of January or the thirty first day of December, the Stock Exchange report at New York said I think it was 11½ cents at put, 13½ was asked——

Mr. Dabney: Yes sir.

Chairman Bagby: And 12½ was the division line of the capital stock. The ratio of the capital stock to their gross receipts was 12½ per cent, so for that reason I capitalized the gross receipts on the supposition it was worth 12½ cents on the amount of money that they had involved, and the amount of money that they had paid, and I for that reason——

Mr. Dabney: Then added it, did you? I am afraid I don't quite understand—pardon me, Mr. Bagby, but was the T. & P. stock averaged at 12½ cents on the dollar?

Chairman Bagby: Yes sir.

Mr. Dabney: On par?

Chairman Bagby: Yes sir.

Mr. Dabney: And you averaged it at 12½ cents for the one

208 reason of course, that was the market value from your best information?

Chairman Bagby: Yes sir—and the ratio of the capitalization to the gross receipts was 12½, and for that reason I took the 12½ not only as to the capital stock but as to the—but as the ratio of the capitalization to the gross receipts.

Mr. Dabney: The ratio of the capitalization to the gross receipts?

Chairman Bagby: Yes sir.

Mr. Dabney: That is, you calculated the value of the stock——

Chairman Bagby: That was just incidental—and then it averaged 12½, and then the capitalization to the gross receipts was 12½, so for that reason I took 12½.

Mr. Dabney: Yes, but you averaged the capital stock of the T. & P., as I understand, at 12½ cents on the dollar?

Chairman Bagby: I did not value it, sir, the Stock Exchange did it.

Mr. Dabney: The Stock Exchange—I mean you adopted that?

Chairman Bagby: That was just incidental—yes, I adopted the capitalization of the gross receipts now, Judge, to the gross receipts, not the value of the stock.

Mr. Dabney: Yes, you divided their capitalization by their average gross income?

Chairman Bagby: Yes sir.

Mr. Dabney: For four years, and found it to be 12½?

Chairman Bagby: Yes sir—and the stock was quoted on an average of 12½.

Mr. Dabney: The stock was quoted on an average of 12½?

Chairman Bagby: Sixteen cents, yes sir.

Mr. Dabney: But after finding the stock of the T. & P. was quoted at 12½, in your preliminary estimate of the value of the T.
209 & P., you valued the stock of the T. & P. at a much larger amount than 12½?

Chairman Bagby: Judge, that was the ratio of the capitalization to the gross receipts, not stock.

Mr. Dabney: Not stock?

Chairman Bagby: No sir.

Mr. Dabney: Then, Mr. Bagby, coming to our road, of course, did you find out what was—if I may ask, what was the value of the capital stock of the I. & G. N.?

Chairman Bagby: What was the capital stock, yes sir.

Mr. Dabney: The value, yes, the market value?

Chairman Bagby: No sir, I could not, because your report did not show it.

Mr. Dabney: You did not make any effort to find out whether it had any market value or not?

Commissioner McKay: There was none quoted.

Mr. Dabney: There was non- quoted. We stated its amount and stated its par value, I remember that.

Chairman Bagby: I think you made a statement of the par value.

Mr. Dabney: Yes, we state the amount and the par value in that report. Then the next subject—I dislike to weary you Gentlemen——

Chairman Bagby: Not at all.

Mr. Dabney: But it is a matter of such great importance that I wish to understand this. I find that the ratio of the T. & P. which is the ratio of gross income to capitalization, is divided by the ratio of the gross income average of four years to the capitalization of the I. & G. N., which would be to divide 12½ as a divisor into 33 53/100 as the dividend, and a resulting quotient of 2.6824. Now I do not—we are puzzled over this greatly, Gentlemen, among us here. I have called on the auditor and others, and none of us understand why that was done, and I just want to know——

210 Commissioner McKay: Judge, it has occurred to me, that whatever reason you want to assign why the intangible value of your road has been placed too high, we would be glad to hear, and I am sure that you would not want to take up the time of the Board by going into all of these little details you perhaps will want to make your case later, and we will be glad to hear any reason you care to assign as to that.

Mr. Dabney: Well I think that is a very practical remark, and the reason why I am trying to go into this is to see how the Board figured it, so as to determine whether or not the Board has pursued a legal method. Of course we all make mistakes, I have no doubt——

Commissioner McKay: Yes sir.

Mr. Dabney: And I think it is the duty of the Board, that all of us state our legal formula which is the major premise of all our reasoning. Now the statute says, in so far as the other evidence or information adduced before the State Tax Board does not make it appear to the members of said Board to be improper or unjust to do so, said Board shall in fixing the true value of the entire property of such individual, corporation, &c., take as the basis thereof—shall take as the basis therefor, the aggregate market value or the true value of all its shares of stock, adding thereto the market or true value of all indebtedness. That formula is therefore, made mandatory upon the Board, unless we have got some legitimate reason to escape from it.

Commissioner Terrell: Judge, if you will pardon me—I just came in, but I take it the purpose of this meeting is to hear you Gentlemen.

Mr. Dabney: Yes sir.

Commissioner Terrell: And not for the purpose of putting the members of the Board on the stand to ask them a thousand questions about what they had done. That is my idea of the purpose of

211 this meeting here. You people may go ahead and make any explanation you want to as to the condition of your road and things of that kind, but that is as far as I understand that we ought to go in the matter at this time.

Mr. Dabney: Well Mr. Chairman, I am sorry to note my demurrer. I think the Board in hearing us, has to lay before us its formula or its process, so that we can determine whether it is correct or not. We are at a loss otherwise, and the Board as well as ourselves, must proceed according to law.

Chairman Bagby: Well how was your intangible found last year?

Mr. Dabney: That was a mystery which—we know it was back of absolute error.

Commissioner McKay: There has been quite a reduction made this year.

Mr. Dabney: Yes sir.

Commissioner McKay: And that still seems to be a mystery.

Mr. Holder: At the time Judge King and I came over, we walked into Mr. Bagby's office, and he said "We haven't got a thing in here but what we will show you," and he says, "I will give you a copy of this statement," which I suppose was the first statement that went out of the office. That is the only information that we got at that time. Then Judge King came back, and I wasn't with him at that time.

Mr. Dabney: Gentlemen, we are compelled to request the Board to give us their formula, and I understand they do not care to discuss the matter further in that regard—am I correct in that respect?

Chairman Bagby: Yes sir.

Mr. Dabney: Just put that down—we would like to learn from the Board whether the Board has aggregated as the primary method of making its calculations, the values—not necessarily the market values—of our stocks and bonds, and why the Board has de-
212 parted from that method? Of course I do not want to weary you Gentlemen further—if you are unwilling to discuss it, I will close.

Commissioner Terrell: Judge, what is the purpose of that?

Mr. Dabney: Because we want to get the formula, Sir, and the statute makes that formula mandatory.

Commissioner Terrell: It gives the Board though, their discretion.

Mr. Dabney: Only in case the Board, upon hearing evidence, finds that formula impracticable.

Mr. McKay: We have heard the evidence.

Mr. Dabney: Yes sir. I understand therefore, that the Board does not care to state further or to explain the processes by which it arrived at the truth. That's all, Gentlemen. I would like to discuss this matter briefly, but I don't want to delay the other railroads, and I expect it would be best for each of us to discuss it briefly after all of us are through."

The above having been introduced in evidence, counsel for the defendants stated that they had not agreed to the truth of the matters set out in this transcript of the proceedings before the State Tax Board of June 18th, 1915, and the court stated that he understood that Counsel for the defendants had not admitted the truth of the statements made in such transcript, but merely that the transcript was an accurate account of the proceedings before the Board, and that the purpose of the introduction of the transcript was to show that the Board was informed at the time, and to this statement Counsel for the Plaintiffs assented stating that he would show that the truth of the matters introduced before the Board were proved to the Board.

In connection with this transcript of the proceedings before the Board, and as a part of the matter introduced before the Board the Plaintiffs introduced in evidence the following tabular statements: These tabulations were attached to and were a part of the written statement made to the Board and testified to as herein appears:

(Here follow reproductions of tabular statements, marked pages 213 and 214.)

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY

Jas. A. Baker & Cecil A. Lyon, Receivers

STATEMENT OF GROSS INCOME - OPERATING DEDUCTIONS FROM GROSS INCOME - NET INCOME - and the VALUE OF THE RAILWAY PROPERTY AND FRANCHISES BASED UPON THE NET INCOME BEING CAPITALIZED AT 7% - FOR THE THREE CALENDAR YEARS ENDED AS INDICATED BELOW:

	Dec. 31st 1914	Dec. 31st 1913	Dec. 31st 1912
GROSS INCOME:			
Freight Revenue,	6,505,078.86	7,376,080.08	8,032,154.86
Passenger Revenue,	2,032,725.65	2,336,166.33	2,494,002.52
Mail Revenue,	254,366.80	263,040.05	249,685.64
Express Revenue,	186,453.68	242,056.41	222,079.37
Other Transportation Revenue,	74,381.65	69,902.87	82,755.83
Other than Transportation Revenue,	100,718.71	105,321.61	108,704.82
Hire of Equipment,	391,133.18	404,020.98	295,831.16
Rentals,	69,244.63	72,972.89	53,302.77
Dining Car Revenue,	24,854.05	20,999.75	31,008.68
Dividends from Stock Owned,		660.00	440.00
Income from Physical Property,	739.77	686.00	
Interest on Bank Deposits,	4,437.55	10,134.96	7,704.01
Donations,	1,612.89		3,226.15
Miscellaneous Income,	10,650.99	8,526.17	270.80
Total Gross Income,	$9,656,398.41	$10,910,568.10	$11,581,166.61
OPERATING DEDUCTIONS:			
Maintenance of Way and Structures,	1,637,704.28	1,438,309.24	1,512,248.80
Maintenance of Equipment,	1,273,846.24	1,390,448.66	1,482,145.82
Traffic Expenses,	305,249.73	324,753.24	304,155.55
Transportation Expenses,	4,392,541.86	4,619,430.67	4,699,697.78
Miscellaneous Operations,	38,652.63	38,969.13	48,046.70
General Expenses,	381,243.35	385,669.87	381,008.06
Taxes,	370,255.83	310,097.49	317,000.00
Hire of Equipment,	881,132.69	1,137,526.50	933,111.03
Rentals,	112,894.76	107,857.34	106,332.22
Miscellaneous Deductions,	4,652.32	359.57	37.85
Discount on Sale of Securities,	185,227.62	485.47	
Loss on Retired Road and Equipment,	7,275.40		
Uncollectible Railway Revenues,	316.43		
Cr. - To eliminate Receivers' Expenses,			Cr 286,766.70
Total Deductions,	$9,590,993.14	$9,753,907.18	$9,497,017.11
NET INCOME,	$ 65,405.27	$1,156,660.92	$2,084,149.50
Income Value at 7 Per Cent.,	$ 934,361.00	$16,523,727.43	$29,773,564.29

Page 213.

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Page 213.

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY

Jas. A. Baker & Cecil A. Lyon, Receivers

CAPITAL STOCK - MORTGAGED, BONDED AND SECURED DEBT - PAR VALUE - OUTSTANDING

Railroad Commission of Texas Valuation Orders and Additions and Betterments not valued

	Dec. 31st 1914	Dec. 31st 1913	Dec. 31st 1912
Capital Stock,	4,822,000.00	4,822,000.00	4,822,000.00
First Mortgage Bonds,	11,291,000.00	11,291,000.00	11,291,000.00
First Refunding Mortgage Bonds,	14,791,000.00	14,256,000.00	13,750,000.00
Colorado Bridge Bonds,	198,000.00	198,000.00	198,000.00
Equipment Notes of Oct. 1st 1908,	152,000.00	190,000.00	228,000.00
Equipment Notes of Aug. 1st 1913,	900,000.00	1,000,000.00	
Total,	$32,154,000.00	$31,757,000.00	$30,289,000.00
PHYSICAL VALUE:			
Railroad Commission of Texas Valuation,	32,471,027.05	32,181,635.00	30,961,321.82
Additions and Betterments - not valued,	1,542,065.02	618,820.24	396,702.09
Total,	$34,013,092.07	$32,800,455.24	$31,358,023.91
INTANGIBLE VALUE,	$1,859,092.07	$1,043,455.24	$1,069,023.91
ANALYSIS OF PHYSICAL VALUE - Val. Orders of:			
March 25th, 1895,	13,942,568.62	13,942,568.62	13,942,568.62
September 10th 1901,	1,315,000.00	1,315,000.00	1,315,000.00
October 30th 1902,	3,331,398.57	3,331,398.57	3,331,398.57
Oct. 9th, 1903,	1,882,555.47	1,882,555.47	1,882,555.47
March 15th, 1905,	515,475.29	515,475.29	515,475.29
September 27th 1911,	9,378,050.02	9,378,050.02	9,378,050.02
June 9th 1913 (Omitted right of way)	589,605.17	589,605.17	
Total I&GN Railroad,	$30,954,653.14	$30,954,653.14	$30,365,047.97
Oct. 31 1912,	596,273.85	596,273.85	596,273.85
June 27 1913,	630,708.01	630,708.01	
July 15 1914,	289,392.05		
Total I&GN Railway,	$1,516,373.91	$1,226,981.86	$596,273.85
Recapitulation:			
Valuation of the I. & G. N. Railroad,	30,954,653.14	30,954,653.14	30,365,047.97
Valuation of the I. & G. N. Railway,	1,516,373.91	1,226,981.86	596,273.85
Total Commission Valuation,	$32,471,027.05	$32,181,635.00	$30,961,321.82
Capital Expenditures I&GN RY:			
Additions and Betterments,	3,058,438.93	1,845,802.10	992,975.94
LESS - Valuation Orders issued,	1,516,373.91	1,226,981.86	596,273.85
Additions & Betterments not Val'd	$1,542,065.02	$ 618,820.24	396,702.09

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215 There was next introduced in evidence the following argument made before the State Tax Board on June 15th, 1915:

"Mr. Dabney: Well to get by it, Sir, I will just say what I have to say to these two gentlemen. Now, Gentlemen, while I have been sitting here listening to this, I have been thinking a little upon some pretty fundamental lines applicable to this whole subject, and that is the fearful increase of taxation. We all know it is going on, and all unjust or illegal taxation has got to be taken up in the higher cost of living of the people. There is no other way for it to go, and upon the fundamental legal propositions, if this taxation you Gentlemen propose is right, it has to be taken up and will be taken up, right or wrong in ultimately increased rates and higher cost of living on the people. Now it seems to me that we are just absolutely departing from our fundamental considerations and foundations of government in this matter of taxation. I remember Gibbons says in his history, that it was not the outside barbarians that destroyed the Roman Empire, but taxation and ever increasing taxation and ever increasing taxation until enterprise ceased, until capital would not invest, until thousands of men would rather not work, because what they did was taken away from them either directly or indirectly; and so when the barbarians broke in, it was the native population that largely rose on the Empire, with the aid of the barbarians, and tore it to pieces—and we are facing the same situation here today. Now you take the situation of the I. & G. N.—you gentlemen have valued its stocks in a preliminary way at over $12,000,000.00. They are par at over $4,000,000.00. You have valued them at a premium of over $8,000,000.00, when those stocks are in the process of being eliminated and being thrown into the waste basket. You know,

216 and you know, Mr. Commissioner, as well as I know, that those stocks are practically worthless—much less paying any dividends, that is, if present conditions continue. They are not paying any dividends whatever, and the bonds which have priority over them, are being foreclosed to the extent of about half the bond issue of the whole railroad, because they are unable to pay an income on the bonds. Now I ask each one of you Gentlemen, as man to man, and as conscience to conscience, on our oaths to obey the law—you know and I know, after we have considered this evidence—of course before you considered it and engaged in these speculations, I imagine it was largely a form with you—that when you say that those bonds are at a premium of $8,000,000.00, those stocks, that you cannot say it because it is not true, and I do not believe that you ever will say it, because I am not prepared to say that such convictions shall grow. It is not your duty, Gentlemen, to create property for the purpose of taxation. There are a great many things I should say—unfortunately, the experience of this railroad is before you—but that is all I care to say. I thank you."

The above is complete of the proceedings before the State Tax Board.

217 (3) The plaintiffs next introduced in evidence the decree of the United States District Court for the Southern District of Texas, Houston Division, in No. 49 Equity, styled Central Trust Company of New York versus International & Great Northern Railway Company. The relevant portions of this decree appoint Jas. A. Baker and Cecil A. Lyon, Receivers of the I. & G. N. Railway Company. It is provided therein that the Receivers are authorized to institute suits, within Texas or elsewhere, in their names as Receivers or in the name of the I. & G. N. Railway Company, "as they may be advised by counsel, that is all such suits as may be necessary in their judgment for the proper protection of the property of the railway in the discharge of their trust." And they are also authorized by the decree to defend or settle all actions against them as Receivers, and to prosecute and defend and compromise all suits whatsoever brought or hereafter brought in any tribunal, to which the Railway Company is or shall be a party, and which in the judgment of the Receivers affect the property.

This decree was dated August 10th, 1914, and it was shown that the Receivers had promptly qualified thereunder.

(4) The plaintiffs next introduced the final decree of foreclosure entered in the last mentioned case, No. 49 Equity, and dated May 17th, 1915. The relevant portions of this decree are as follows:

It refers to the foreclosed mortgage entitled the "First Refunding Mortgage," attached to the bill, and executed by the I. & G. N. Railway Company August 1st, 1911, whereby all the property then owned by the Railway, or thereafter to be acquired by it, was conveyed to the Central Trust Company of New York, Trustee. The decree of foreclosure ascertained the existence of $11,000,000 in gold notes,
218 the interest on which was defaulted upon on August 1st, 1914, and declared the amount due on this $11,000,000 in notes at the date of the decree, May 17th, 1915, to be $11,727,490.80. It was declared that the amount of the principal of the First Refunding bonds was $14,858,000, and that there was principal and interest due thereon at the date of the decree of $15,836,512.79, but that the principal of $13,750,000 with accrued interest thereon of these bonds had been pledged to secure the $11,000,000 in notes, leaving $1,108,000 in the bonds outstanding outside of said pledge, on which there was due principal and interest at the date of the decree $1,180,970.26. Therefore, adding together the amount due on the notes secured by the bonds, to-wit: $11,727,490.80, and the bonds outstanding outside of the pledge, to-wit: $1,180,970.26, the court ascertained and settled the amount of $12,908,461.06 as due, together with interest at six per cent per annum from the date of the decree; and it was decreed that the Railway should have until August 21, 1915, to pay this last amount, but that if it did not pay it the property should stand for sale and be sold by the Court's Commissioner at a date to be set by the Court. It was prescribed that the property should be sold subject to the lien of any and all taxes chargeable on the mortgaged property, and subject to the "First Mortgage" of November 1st, 1879, made to Kennedy and Sloan as Trustees, and to the Colorado Bridge Mortgage and the equipment obligations.

This decree was introduced in evidence over the objection of the defendants.

(5) The plaintiffs next introduced the two tabular statements set out above, which had been shown to have been submitted to the State Tax Board at the hearing on June 18th, 1915, held in Austin, and introduced them independently of that hearing as well as in connection therewith. These tables are Exhibits "C" and "D" in the hearing held in Austin, and having been set out above are not repeated here.

219 Before these documents were introduced objection was made thereto, which was overruled, so far as the same was a part of the proceedings before the State Tax Board on June 18th, 1915, but for other purposes they were admitted subject to their being proved by the plaintiffs; these objections being made when the Record before the State Tax Board was introduced.

(6) W. J. Werner, called by the plaintiffs, testified as follows: Witness is Auditor for Receivers of the I. & G. N. Railway, which receivership was taken out on August 10th, 1914, but he had been Auditor of the railway since April 1913, and Assistant Auditor before that time. His duties were to keep the books of accounts and statistics, and generally to perform the duties of an Auditor, and particularly of a railroad Auditor, and he was and is the head of a department.

The witness was handed two sheets, being the tabular statements above set out and introduced before the State Tax Board as its hearing on June 18th, 1915. He identified these sheets and stated that they were made under his direction, and that the statements and figures therein were absolutely correct, as shown by the books, and that they were correct deductions from his books.

The witness testified that he was present at the hearing before the State Tax Board on June 18th, 1915, and testified, and that he has heard the transcript of the testimony which he gave before the State Tax Board, and that the sheets and tabular statements he is testifying to are identical copies of the statements submitted to the State Tax Board. As these sheets had been admitted in evidence subject to their verification, if taken for general purposes, being Exhibits "C" and "D" of the statements before the State Tax Board, they were again tendered in evidence for all purposes. The defendants' counsel desired to examine the witness Werner before making their objections to the admission of these tabular statements. On such examination by defendants' counsel, the witness testified that

220 these statements were made up in his office by himself personally from the books and records, and that he knew of the accuracy of these tabulations, but that they were derived from his books and his personal knowledge did not go further than his books; for instance, he knew as to the statements as to freight revenue only from his books and which would involve the collaboration of the efforts of the freight agents and clerks who reported to him, say 130 persons; that the reports of the freight agents were not made directly to him but went to the chief clerk of freight accounts in his office,

and were checked by the subordinates of this clerk, and by them the amount due the Company would be determined. The witness stated that he sometimes saw these reports personally and sometimes did not, as a general thing he only saw the results after they got upon the books; that he would not know, except as stated, whether these matters were correct or not. They were not done in his presence; that he had no checks of the matter except that it was put upon his books and balanced; that he assumed that his books were correct. The defendants then objected to these tabular statements, already copied above. Their objections were overruled and they were introduced in evidence for all purposes.

The witness was then further examined by the plaintiffs as follows: He stated that the system of bookkeeping pursued in his office was that prescribed by the Interstate Commerce Commission, and that they were true books as far as his knowledge went, and that there were no falsehoods on them to his knowledge; that the books were subject to inspection and had been inspected. The system prescribed by the Interstate Commerce Commission and followed by him was elaborate.

The witness was then asked whether or not he had the valuations made by the Railroad Commission of Texas of the I. & G. N. Railway properties, and he produced valuations which showed as follows: Valuation made by Commissioners Reagan, Foster and Storey of
date July 11th, 1895, $13,942,568.62. This valuation is
221 stated to have been made in accordance with Act of the
Twenty-Third Legislature, approved April 8, 1893. He stated that the main track mileage of the railroad was at that time, to-wit, March 20, 1895, 771.16 miles. To the introduction of this document the defendants objected, but it was overruled. Next was introduced the valuation of September 10, 1901, in addition to the above, of $1,315,000; next the valuation of October 30, 1902, of $3,331,398.57. Next was introduced the valuation of October 9 1903, of $1,182,555.47. Next was introduced the valuation of March 15, 1905, of $515,475.29. This was the valuation of the Houston-Magnolia Park Branch of 7.61 miles in and near Houston Texas, and which had been acquired by the I. & G. N. Railroad. It included, among other things, right of way, depot and termina grounds, valued at $308,180.00, street franchises valued at $100,000 The analysis made in the report of the engineer of the Commission shows that the depot grounds Houston, Blocks 6 and 12, and 2/12 of Block 11, and Lot 10 Block 10, were valued at $200,000, and that the terminal grounds on Buffalo Bayou were valued at $75,420 These depot grounds are stated in the report of the engineer to be of great value and to be situated within one block of the courthouse and to be more accessible than the grounds of any other railroad in the city. Next was introduced the valuation of September 27, 1911 made on the application of Thomas J. Freeman, President of the I. & G. N. Railway Company. This was a summation and stated that the value of the I. & G. N. Railway property now in possession of that railway aggregated the total sum of $30,365,047.97, but that this valuation was made subject to additions which might result from

an examination now being made by the Railroad Commission as to certain real estate claimed by the Railway to have been omitted from previous examinations. It was ordered that under the mortgage of 1911 executed by the Railway, it could issue bonds in the amount of $13,750,000, and that the same should be in all things approved.

It was explained by the witness Werner that he did not mean
222 that he had produced all of the valuations but that the summation last stated of $30,365,047.97 included the valuations made to the date of September 27, 1911. Next was introduced valuation of June 27, 1913, covering the rolling stock, and also in its summation including valuation of October 31, 1912, all omitted real estate referred to in the last valuation. The valuation of October 31, 1912, was $596,273.85. The valuation of June 27, 1913, was $630,708.01, and the valuations by the order of June 27, 1913, were aggregated by the Commission and stated to be of the aggregate value of $32,181,635.

From time to time these valuations were made additional bond issue was authorized under the mortgage of 1911, foreclosed by the decree referred to above. The witness stated that the Commission had made an *atti*-onal valuation on July 16, 1914, of $289,392.05, making the total Railroad Commission valuations to date of $32,471,-027.05.

It was shown by these documents that the course of the Commission was not to revalue any property which it had valued, but from time to time to value the additions and betterments and add them to the valuations already made. It was then agreed in evidence that the total stated by Mr. Werner of $32,471,027.05 was correct as the total of all of the Railroad Commission valuations.

The witness was then handed a document and asked whether or not that was the report of the Receivers to the State Tax Board made before the State Tax Board and was the assessment for 1915. He stated that it was a true copy. This document was then introduced in evidence over the objections and exceptions of the defendants. It was stated by counsel for plaintiffs that this document was offered as part of the proceedings before the State Tax Board, and second as

containing a summary of statistics and statements. The
223 court stated that the document was introduced subject to verification. Counsel for the plaintiffs then stated to the Court that he desired to show that in the hearing before the State Tax Board one or two errors in this document were explained to the Board, and the witness Werner was then questioned thereon and asked what was intended on the first page of this document by the figures $4,822,000 set down opposite the inquiry "If no market value, then actual value thereof?" To this the witness answered that he had set down the actual book value of the stock, the only value he had any knowledge of, and that he had set down these figures as they are carried on the books. The document was then introduced in evidence and was as follows:

224 *Tax Statement of International & Great Northern Railway Company.*

(Jas. A. Baker & Cecil A. Lyon, Receivers.)

(Made in Compliance with Provisions of Section 10, Chapter 17, of the General Laws of the First Called Session of the 30th Legislature of Texas.

For Year Ending December 31st, 1914.

(*a*) Name of Company International & Great Northern Railway Company (Jas. A. Baker & Cecil A. Lyon, Receivers.)
Character of its business Transporting Freight and Passengers and United States Mail as a Common Carrier.

(*b*) Authority by which incorporated Laws of State of Texas.
Purpose of its incorporation as expressed in charter Acquiring, owning, maintaining and operating, also including the power to construct and extend.

(*c*) Locality of its principal office in this State Houston, Texas.

Amount and kind of business done by it in this State during 1914 (Ex. "A.")	$9,645,785.94
Total gross receipts derived from its business within this State, including a due proportion interstate business during 1914	9,645,785.94
(*d*) Its total authorized capital stock	11,500,000.00
Shares of capital stock issued and outstanding. No. 48,220.	
Par or face value of each share of stock	100.00
Amount of capital actually employed in its business within this State (Ex. "B.")	32,559,136.43
(*e*) The market value of said shares of stock	
If no market value then the actual value thereof	4,822,000.00

(*f*) See pages 2 and 2*a* herewith.
(*g*) See page 3 herewith.
(*h*) See page 4 herewith.

(*i*) Total gross receipts from all sources for the twelve months next preceding, January 1, 191.., including therein all interests on investments, and all rents, grants, revenues and receipts from every source whatsoever (Exhibit "A.")	9,645,785.94
Net income and earnings for the next preceding twelve months (Deficit)	1,294,769.61
Amount of income used for repairs	2,911,550.52
Amount used for betterments (Exhibit "C")	241,456.83
Amount used for extensions	None
(*j*) 1. Total length of all lines of said company within and without the State....Miles	1,106.00
2. Total length of lines within the State .....Miles	1,106.00

3. See page 5 herewith.

225 International & Great Northern Railway Co.

Jas. A. Baker & Cecil A. Lyon, Receivers.

Accounting Department.

EXHIBIT "C."

Expenditures for Additions and Betterments, Year 1914.

Road.

A 1.	Right of Way and Station Grounds	$22.25	
A 3.	Widening Cuts and Fills	734.90	
A 4.	Protection of Banks and Drainage	18,432.50	
A 7.	Bridges, Trestles and Culverts	37,956.30	
A 8.	Increased Weight of Rail	7,035.27	
A 9.	Improved Frogs and Switches	737.24	
A 10.	Track Fastenings and Appurtenances	4,713.50	
A 11.	Ballast	25,105.15	
A 13.	Sidings and Spur Tracks	28,318.79	
A 14.	Terminal Yards	571.96	
A 15.	Fencing Right of Way	5,269.24	
A 16.	Improvement of Crossings Under & Over Grade	984.10	
A 21.	Station Buildings and Fixtures	34,483.[illegible]	
A 22.	Roadway Machinery and Tools	8,200.[illegible]	
A 23.	Shops, Enginehouses and Turntables	2,001.36	
A 24.	Shop Machinery and Tools	662.25	
A 25.	Water and Fuel Stations	837.42	
A 34.	Interest and Commission	12,603.36	
A 35.	Other Additions and Betterments	22,858.47	
	Total Road		$183,707.09

Equipment.

A 33.	Locomotives	$10,382.15	
	Passenger Train Cars	2,319.78	
	Freight Train Cars	27,292.22	
	Work Equipment	17,755.59	
	Total Equipment		57,749.74
	Total Road and Equipment		$241,456.83

226 International & Great Northern Railway Co.

Jas. A. Baker & Cecil A. Lyon, Receivers.

Accounting Department.

EXHIBIT "A."

Gross Receipts of the I. & G. N. Railway Company Jan. 1st, 1914, to Aug. 10th, 1914; and I. & G. N. Railway Company, Jas. A. Baker & Cecil A. Lyon, Receivers, Aug. 11th, 1914, to December 31st, 1914; from All Sources Year Ending December 31st, 1914.

Freight Revenue	$6,505,078.86
Passenger Revenue	2,004,496.44
Mail Revenue	254,366.80
Express Revenue	186,453.68
Other Transportation Revenue	102,610.86
Other Than Transportation Revenue	125,572.76
Hire of Equipment	391,133.18
Rental	69,244.63
Miscellaneous Non-Operating Physical Property	739.77
Interest on Bank Deposits	4,437.55
Miscellaneous Income	38.52
Donations	1,612.89
Total	$9,645,785.94

227 International & Great Northern Railway Co.

Jas. A. Baker & Cecil A. Lyon, Receivers.

Accounting Department.

EXHIBIT "B."

Capital Employed by the I. & G. N. Railway Company, Jas. A. Baker & Cecil A. Lyon, Receivers, in Its Business Within the State of Texas, December 31st, 1914.

Capital Stock	$4,822,000.00
First Mortgage I. & G. N. R. R. 6% Gold Bonds of 1879	11,290,500.00
First Mortgage Colorado Bridge 7% Gold Bonds of 1880	198,000.00
First Refunding 5% I. & G. N. Ry. Gold Bonds of 8/1/1911	1,600,000.00
First Refunding 5% I. & G. N. Ry. Gold Bonds of 2/1/1913	506,000.00
First Refunding 5% I. & G. N. Ry. Gold Bonds of 2/1/1914	535,000.00

Three Year 5% Gold Notes, I. & G. N. Ry. of 8/1/1911.....	11,000,000.00	
Receivers' Equipment Certificates 6% of 10/1/1908.....	152,000.00	
Equipment Notes, Series "A," I. & G. N. Ry. of 8/1/1913....	900,000.00	
Capital Liabilities Outstanding 12/31/1914.		$31,003,500.00
Capital Liabilities Paid Off Since Sept. 16, 1911:		
San Antonio Depot Bonds...	28,000.00	
Receivers' Equipment Certificates	114,000.00	
Equipment Notes, Series "A"	100,000.00	242,000.00
Capital Invested in Betterments:		
Sept. 16th, 1911 to Dec. 31st, 1911	196,938.06	
Jan. 1st, 1912 to Dec. 31st, 1912	796,037.88	
Jan. 1st, 1913 to Dec. 31st, 1913	1,824,006.16	
Jan. 1st, 1914 to Dec. 31st, 1914	241,456.83	
	3,058,438.93	
Less Securities Issued:		
First Refunding Bonds.. 1,041,000.00		
Equipment Notes, Series "A" 1,000,000.00		
	2,041,000.00	1,017,438.93
Capital used in paying Liabilities of I. & G. N. R. R. Co. and I. & G. N. R. R. Co., T. J. Freeman, Receiver		284,388.31
Capital Stock Union Compress & Warehouse Company		4,400.00
Bonner & Bonner A/C Real Estate.....		7,409.19
Total Capital Employed		$32,559,136.43

228 *Income Account.*

Operating Revenue:	
Freight Revenue	6,505,078.86
Passenger Revenue	2,004,496.44
Mail Revenue	254,366.80
Express Revenue	186,453.68
All other Transportation Revenue	102,610.86
Revenue from Operations other than Transportation	125,572.76
Total Operating Revenue	9,178,579.40
Operating Expenses:	
Maintenance of Way and Structures	1,637,704.28
Maintenance of Equipment	1,273,846.24
Traffic Expenses	305,249.73
Conducting Transportation	4,392,541.86
Miscellaneous Operation	38,652.63
General Expenses	381,243.35
Total Operating Expenses	8,029,238.09
Income from Operation	1,149,341.31
Income from other Sources	467,206.54
Total Income	1,616,547.85
Deductions from Income:	
Taxes	370,000.00
Interest on Bonds—accrued	1,055,479.60
Interest on Bills Payable	248,306.70
Interest on Car Trust Notes	56,388.58
Hire of Equipment	881,132.69
Additions and Betterments	.....
Other Deductions	300,009.89
Total Deductions	2,911,317.46
Net Income for the Year (Deficit)	1,294,769.61

229 I-*b*.

(1)	What is the total amount of State taxes paid by your Company on the 1914 assessment?.....	$113,686.50
(2)	What is the total amount of County taxes paid by your Company on the 1914 assessment?.....	$143,826.44
(3)	What is the total amount of School District taxes paid by your Company on 1914 assessment?..	$29,123.74
(4)	What is the total amount of City and Town taxes paid by your Company on 1914 assessment?..	$66,847.15
(5)	What is the total amount of Franchise taxes paid by your Company for the year 1914?.....	$3,225.00
(6)	What is the total amount of all other taxes paid by your Company for the year 1914?.....	$18,072.25

230 The assessed value and also the true value of all the tangible property owned by such company in each of the counties of the State, and the total assessed value, and also the true value of the same.

(Exclusive of Rolling Stock.)

Name of county.	Mileage in county.	Assessed value of property in county, exclusive of rolling stock.	Actual value of property in county, exclusive of rolling stock.	Remarks.
Anderson	48.54	1,602,880	$1,121,937.45	
Atascosa	1.39	35,485	20,127.31	
Brazos	38.40	1,094,246	707,179.42	
Bexar	39.33	1,301,223	795,458.73	
Brazoria	26.58	561,798	260,951.69	
Cherokee	28.98	728,120	430,400.29	
Comal	24.89	637,059	426,591.39	
Ellis	28.27	625,215	697,493.09	
Freestone	2.67	64,345	62,123.10	
Frio	34.54	780,699	445,085.86	
Fort Bend	10.07	193,710	113,810.90	
Falls	32.71	820,660	592,937.84	
Gregg	13.88	337,588	265,271.73	
Grimes	61.79	1,396,289	952,273.73	
Hays	24.31	658,940	445,544.77	
Houston	36.31	983,860	439,994.06	
Harris	62.10	1,777,785	1,660,393.98	
Hill	21.89	613,760	464,902.54	
Johnson	14.43	318,273	303,729.43	
Leon	45.04	1,130,624	575,078.07	

La Salle	44.31	934,861	516,829.60	
Madison	6.70	151,420	106,618.80	
Milam	37.39	845,204	554,221.19	
Medina	13.74	303,744	165,021.43	
Montgomery	40.00	1,012,750	628,578.54	
McLennan	37.58	962,426	721,122.52	
Navarro	.02	460	442.67	
Rusk	25.45	568,475	279,403.53	
Robertson	73.14	1,717,185	997,452.59	
Smith	52.68	1,401,018	783,568.23	
Travis	27.33	794,820	708,191.23	
Trinity	15.86	365,766	272,346.48	
Tarrant	14.82	358,700	442,461.49	
Wood	4.88	123,448	106,008.58	
Walker	33.41	888,570	497,238.98	
Williamson	42.84	999,630	662,877.97	
Waller	1.78	40,228	22,108.40	
Webb	37.95	835,180	534,757.27	
Totals	1,106.00	27,966,444	$18,780,534.88	
			7,246,275.90	
			$26,026,810.78	Additional allowed by R. R. Com. but not distributed according to counties.

231 The assessed value and also the true value of all the rolling stock owned by said company and apportioned by the Comptroller to each of the counties of the State in which said road is operated.

Name of county.	Mileage.	Assessed value of rolling stock apportioned to each county.	Actual value of rolling stock to which county is entitled.	Remarks.
Anderson	48.54	$99,530	.....	
Atascosa	1.39	2,850	.....	
Brazos	38.40	78,738	.....	
Bexar	39.33	80,645	.....	
Brazoria	26.58	54,502	.....	
Cherokee	28.98	59,420	.....	
Comal	24.89	51,036	.....	
Ellis	28.27	57,965	.....	
Freestone	2.67	5,475	.....	
Frio	34.54	70,823	.....	
Fort Bend	10.07	21,260	.....	
Falls	32.71	67,070	.....	
Gregg	13.88	29,158	.....	
Grimes	61.79	126,699	.....	
Hays	24.31	49,840	.....	
Houston	36.31	74,450	.....	
Harris	62.10	105,108	.....	
Hill	21.89	44,880	.....	
Johnson	14.43	29,588	.....	
Leon	45.04	92,353	.....	
La Salle	44.31	90,856	.....	
Madison	6.70	13,740	.....	

Milam	37.39	76,667	.....	
Medina	13.74	28,174	.....	
Montgomery	40.00	82,020	.....	
McLennan	37.58	77,055	.....	
Navarro	.02	40	.....	
Rusk	25.45	52,185	.....	
Robertson	73.14	149,971	.....	
Smith	52.68	108,019	.....	
Travis	27.33	56,040	.....	
Trinity	15.86	32,520	.....	
Tarrant	14.82	30,390	.....	
Wood	4.88	10,006	.....	
Walker	33.41	68,500	.....	
Williamson	42.84	87,630	.....	
Waller	1.78	3,650	.....	
Webb	37.95	77,815	.....	
Totals of I. & G. N.	1,106.00	$2,246,668	.....	
Galveston	26.00	53,512	.....	Joint Trackage with G. H. & H. and M. K. & T.
Harris	22.83	46,812	.....	Joint Trackage with G. H. & H. and M. K. & T.
Totals	1,154.83	$2,346,992		

232 The assessed value and also the true value of the tangible property of such company outside of this State and not specifically used in the business of such company, same to be given by States, and the total assessed value, and also the total true value of same.

232*a* Statement of each and every existing lien, mortgage or other charge upon the whole or any part of the property of such company, and of the property thereby charged or encumbered, and of the amount of unpaid debt secured by each such mortgage, lien or charge, and of the interest charge thereon, and to what extent such interest has been paid.

See Exhibit "D."

The true and fair market value of every such debt.... $.....
$.....
$.....

(Here follows reproduction of Exhibit "D," marked page 232*b*.)

232*c* The length of its lines in each of the counties in this State into which its lines extend.

Name of county.	Mileage.	Remarks.
Anderson	48.54	
Atascosa	1.39	
Brazos	38.40	
Bexar	39.33	
Brazoria	26.58	
Cherokee	28.98	
Comal	24.89	
Ellis	28.27	
Freestone	2.67	
Frio	34.54	
Fort Bend	10.07	
Falls	32.71	
Gregg	13.88	
Grimes	61.79	
Hays	24.31	
Houston	36.31	
Harris	62.10	
Hill	21.89	
Johnson	14.43	
Leon	45.04	
La Salle	44.31	
Madison	6.70	
Milam	37.39	
Medina	13.74	
Montgomery	40.00	
McLennan	37.58	
Navarro	.02	

FIRST MORTGAGE I&GN RR CO. 6% GOLD BONDS.....	
40 Year Gold Bonds, due Nov. 1st, 1919. This mortgage encumbers all property, real and personal, together with all its corporate rights privileges, immunities and franchises, except that from the lien of the First Mortgage were excepted and reserved all land grants, land, land certificates, town lots and townsite owned or controlled by said company, which were not at the time of execution of said mortgage actually occupied and in use of said company and necessary to the occupation and maintenance of the line of Railroad,.....	
FIRST REFUNDING MORTGAGE, 5% GOLD BONDS.....	
Due August 1st, 1941. These bonds secured by same property encumbered by First Mortgage Bonds and subject to the First Mortgage Bonds, the Colorado Bridge Bonds and the Equipment Notes.....	
FIRST REFUNDING MORTGAGE, 5% GOLD BONDS.....	
Due August 1st, 1941. These bonds secured by same property encumbered by First Mortgage Bonds, and subject to the First Mortgage Bonds, the Colorado Bridge Bonds and the Equipment Notes.....	
THREE YEAR 5% GOLD NOTES, I&GN RY. Co.....	
Due August 1st, 1914. Secured by $12,150,000.00 First Refunding Mortgage Bonds.....	
FIRST MORTGAGE 7% COLORADO BRIDGE BONDS.....	
Due May 1st, 1920. Property encumbered, Colorado Bridge, ...	
RECEIVER'S EQUIPMENT NOTES.....	
$19,000.00 due April and October 1915 to 1918, inc Property encumbered, 10 locomotives and 500 box cars, ...	
EQUIPMENT NOTES, SERIES "A" I&GN RY. CO., ...	
$50,000.00 due February and August 1915 to 1923, Inclusive. Property encumbered, 13 locomotives, 200 ventilated box cars, 200 box cars, 400 stock cars and 200 gondola cars,.....	
TOTAL,.....	

ONAL & GREAT NORTHERN RAILWAY COMPANY

JAS. A. BAKER & CECIL A. LYON, RECEIVERS.

ACCOUNTING DEPARTMENT

EXHIBIT "D".

TATEMENT OF LIENS AND MORTGAGES, YEAR ENDING DECEMBER 31ST, 1914.

	AMOUNT ISSUED	HELD IN TREAS'Y	PLEDGED AS COLLATERAL	OUTSTANDING	RATE	PAYABLE	INTEREST AMOUNT UNPAID AND DUE	REMARKS
.....	$11,291,000.00	$500.00		$11,290,500.00	6%	May & Nov.	$6,630.00	Coupons not Presented.
d at y ary of								
..... ds	13,750,000.00		$12,150,000.00	1,600,000.00	5%	Feb. & Aug.	None	
..... ds.	1,041,000.00			1,041,000.00	5%	Feb. & Aug.	26,025.00	In Default
..... 1.00	11,000,000.00			11,000,000.00	5%	Feb. & Aug.	75.00 275,000.00	Coupons not Presented. in default
..... rado	198,000.00			198,000.00	7%	May & Nov.	All Paid	
..... , ino x	152,000.00			152,000.00	6%	Apr & Oct.	All Paid	
..... 23, s, ock	900,000.00			900,000.00	5%	Feb. & Aug.	250.00	Coupons not Presented.
.....	$38,332,000.00	$500.00	$12,150,000.00	$26,181,500.00				

2.32 b

Rusk	25.45
Robertson	73.14
Smith	52.68
Travis	27.33
Trinity	15.86
Tarrant	14.82
Wood	4.88
Walker	33.41
Williamson	42.84
Waller	1.78
Webb	37.95
Total Mileage	1,106.00

232*d* STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared W. J. Werner, a resident of the county of Harris, State of Texas, who being by me first duly sworn, upon oath says:

That he is Auditor for the Receivers and is an officer of* International & Great Northern Railway Company (Jas. A. Baker & Cecil A. Lyon, Receivers) a corporation which has its principal office in the city of Houston County of Harris State of Texas, and which is doing business within the State of Texas; that as such officer and in behalf of said corporation, and being thereunto duly authorized, he makes this affidavit.

That the above and foregoing statement of items, and particulars of the business, properties, assets and liabilities of the said corporation as the same stood on the first day of January, 1915, is, within affiant's personal knowledge, true in substance and in fact; said statement being required to be made by said corporation by act of the First Called Session of the Thirtieth Legislature of Texas, approved May 16, 1907, and by Sections 9 and 10 of said act and known as Chapter 17 of the published laws of said Legislature, and appearing on pages 469 to 478 of said laws.

W. J. WERNER,
Auditor for Receivers.

Subscribed and sworn to before me on this the — day of ——, A. D. 1915.

[SEAL.]

——— ———,
N. P. Harris Co.

232*e* [Endorsed:] File No. —. Tax statement of —— ——. Received at the office of the State Tax Board this — day of —— A. D. 191—. —— ——, Tax Commissioner.

*See Chapter 4, Title 94, Article 4387, Revised Statutes.

233 The witness Werner then testified on the document as follows: He stated that the principal office of the railway was in Houston, Texas, and that the figures contained on the first sheet of the document were correct, and that the Exhibit "A" was correct as showing the gross receipts for the railway for the calendar year 1914 as compiled from his books; that the statement was correct including the interstate business; that the total authorized stock of the railway was $11,500,000 but that the actual stock issue was 48,220 shares of the par value of $100.00 each, and that Exhibit "B" was correctly made up from his books, and that there was no net income but a deficit for 1914 of $1,294,769.61; that this meant the expenses and cost of operation exceeded the income by the amount stated, counting into the cost of operation and expenses, taxes, interests and not dividends, that is after deducting operating costs, taxes and fixed charges this deficit existed; that the statement as to the amount used for repairs was correct, being the amount used for repairs to equipment, roadway and structures, exclusive of betterments, but that the statement as to betterments was correct; that nothing was used for extensions; that all of the property of the I. & G. N. Railway was in Texas, where it had 1,106 miles of main track. The witness stated that the sheets in this report relating to assessed valuations were not made by him, but the sheet stating the amount of taxes for the year 1914 was correct. The sheet not made by him was made by Mr. Holder. As to the statement of liens and mortgages, that statement was correct, showing in detail the lien obligations existing December 31, 1914. As to the sheet of number of miles in each County, witness stated he did not make — but it was furnished by Mr. Holder, Land & Tax Commissioner of the Receivers; that he had made this report and made his affidavit to it and delivered it to the State Tax Board before their meeting in Austin on June 18, 1915. The witness was then

234 asked whether or not he had heard on a previous day of this trial, he being present in court, a transcript purporting to be a transcript, among other things, of his testimony and statements before the State Tax Board on June 18, 1915, and was asked whether or not he heard it read and stated that he had heard it read, that it was correct and that all the matters stated therein as coming from him were true; that he testified before the State Tax Board before to those matters.

The witness Werner was asked to direct his attention to Exhibits "C" to the protest filed before the State Tax Board, and introduced in evidence above. He was asked what he meant by capital expenditures I. & G. N. Railway, and stated expenditures for additions and betterments of new property made since the organization of the Railway, which went into action in September, 1911. And further, that the figures given were correct to Dec. 31, 1914. The witness testified that this tabulation in Exhibit "C" as well as Exhibit "D", both set out above, the latter being a statement of gross income, etc., were correct and made from his books.

He also testified, over the objection and exception of the defendants, that by the foreclosure of 1910-1911, $3,852,785 of principal

floating indebtedness had been wiped out with interest from various dates, and that the Third Mortgage Bonds of the sold-out I. & G. N. Railroad in 1911 amounted to principal $2,966,052.50. Coming to the amount of the indebtedness of the I. & G. N. Railway on June 30, 1915, the witness said that there were Three Year Notes matured, unpaid, $11,000,000 principal, but that these were secured by bonds which had been passed into a decree of foreclosure but that the floating indebtedness of the Railway on June 30, 1915, including that of the Receivers, was $3,940,867.88, the Receivers' indebtedness being $2,140,667.59, and the I. & G. N. Railway floating indebtedness being $1,800,200.29. The plaintiffs here introduced in evidence, over the objection and exception of the
235 defendants, the following statement prepared by Mr. Werner:

"I. & G. N. Ry. and Receivers' Floating Debt, June 30, 1915.

Nature of debts.	I. & G. N. Ry.	Receivers.	Total.
Loans and Bills Payable	2,843.50	.....	2,843.50
Traffic & Car Service Balances	13,188.15	301,911.92	315,100.07
Audited Vouchers Unpaid	780,810.80	724,513.55	1,505,324.35
Audited Pay Rolls Unpaid	.....	321,593.85	321,593.85
Miscellaneous Accounts Payable	125.78	3,361.96	3,487.74
Matured Interest Unpaid	862,318.99	.....	862,318.99
Three Year Notes Matured, Unpaid	11,000,000.00	.....	11,000,000.00
Unmatured Interest Accrued	160,746.55	6,000.00	166,746.55
Unmatured Interest Accrued	.....	13,262.50	13,262.50
Receivers' Certificates	.....	600,000.00	600,000.00
Taxes Accrued—Unmatured	19,833.48	170,023.81	150,190.33
	12,800,200.29	2,140,667.59	14,940,867.88

Auditor's Office I. & G. N. Ry. Co.,
Houston, Texas, March 6, 1916."

This statement included, as stated above, $11,000,000.00 which are to be deducted.

The witness further stated that interest on the First Mortgage against the properties, issued in 1879, principal amount of which is $11,291,000.00, has been paid as it fell due since its origin to the present time, as appears upon the books of the Company, and that since the witness had been connected with the Railway the payment of this interest had been out of all three sources of borrowed money, Receivers' certificates and income. It is six per cent and falls due November 1st and May 1st, bi-annually. The interest falling due Nov. 1st, 1915, was paid from income; that falling due May 1st, 1915, from the proceeds of Receivers' certificates, there being no net income on hand to pay it, but that it was paid as far as the witness' recollection went, from income on November 1st, 1914, but that on May 1st, 1914, the witness is uncertain whether it was paid from income or borrowed money. There had been borrowed money, which went into the Treasurer's box and
236 was not ear-marked. The last interest on the recently foreclosed mortgage, being the second mortgage on the properties, was paid in February, 1914. No interest has been paid since. Here an objection was made by defendants to the last set-out statement, whereupon counsel for the plaintiffs offered all of the books of the Railway from which such statement was taken, stating that free access could be had thereto.

(7) W. L. Maury, duly sworn, testified that he had been connected with the I. & G. N. Railroad properties since July 1881, and was Auditor thereof from May 1888 to April 1913, and has since been Consulting Auditor, and is still in the service. A sheet was handed Mr. Maury, dated Houston, Texas, July 19, 1915, entitled "Net income available for Interest, Dividends, Additions and Betterments, etc., and its per cent to Railroad Commission of Texas Valuations allowed to June 30, 1914, allotted back to the year in which the expenditure was taken up on I. & G. N. R. R. books." Mr. Maury was asked whether he made this statement and stated that he did, and explained it as follows: It represents net income available for interest and betterments to June 30, 1914, allotted back to the year in which the expenditure was taken up on I. & G. N. Railroad books and I. & G. N. Railway books, and both. In many cases the charges against income were taken up in the subsequent year, and these were re-allotted back to the year in which they properly should have been charged, but this re-allottment back would not vary the final result, that is the average calculations are approximately correct. The witness had taken $17,000,000 as the Railroad Commission valuation existing in 1901. The first valuation was made in 1895, but this calculation commenced in 1901 and gives the experience on the average from that time forward; that for the year 1908 he had not carried out any income per cent because there was a deficit of $395,437.98; that he thought that he had deducted tax payments but was not sure. This statement was compiled by the witness. The witness then said

237 that he had taken into consideration taxes and deducted them, and that for the fourteen year period there was available on the average for each year from 1901 to 1914 inclusive, for interest, dividends, additions and betterments, $1,141,000, which would make a per cent to the Railroad Commission valuations of 4.251, and for the ten year period 3.87. Duplicate statement made by Mr. Maury was then introduced in evidence, and was as follows:

"International & Great Northern Railway Company.

Accounting Department.

Net Income Available for Interest, Dividends, Additions, and Betterments, etc., and Its Per Cent to Railroad Commission of Texas Valuations Allowed to June 30, 1914, Allotted Back to the Year in Which the Expenditure Was Taken up on Int. & Grt. Nor. R. R. Books.

	Net income available for interest, etc.	R. R. Com. valuation to June 30, 1914, apportioned to the years in which the investment was taken up on I. & G. N. books.	Per cent of net income to Commission valuation.
1901	1,287,970.39	17,319,036.60	7.44
1902	1,154,412.82	20,951,880.78	5.51
1903	1,201,822.41	24,518,304.19	4.90
1904	1,186,630.66	25,349,632.25	4.74
1905	1,235,393.87	25,626,245.69	4.82
1906	645,823.61	25,880,407.45	2.50
1907	1,930,030.98	27,466,802.43	7.03
1908	.....	27,744,031.97	....
1909	782,508.43	28,154,119.19	2.78
1910	971,160.91	28,537,845.12	3.40
1911	1,234,897.45	29,202,502.99	4.23
1912	2,203,593.36	30,921,279.29	7.13
1913	1,668,236.40	32,181,635.00	5.18
1914	878,327.60	32,181,635.00	2.73
10 Year Average	1,115,453.46	28,789,650.41	3.87
14 Year Average 1901 to 1914	1,141,812.21	26,859,668.42	4.251
7 Year Average 1901 to 1907	1,234,587.82	23,873,187.06	5.171
7 Year Average 1908 to 1914	1,049,040.88	29,846,149.79	3.515

Houston, Texas, July 19, 1915."

Cross-examination by defendants:

The witness stated that in order to reach net income avail-
238 able for interest, dividends, additions and betterments, he deducted operating expense, taxes, hire of equipment and miscellaneous charges; that there had been a change in the method of

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY

Jas. A. Baker & Cecil A. Lyon, Receivers.

CAPITAL DEBT

	June 30,1911	Sept 15,1911	Sept 16,1911	June 30,1912	June 30,1913	June 30,1914
Capital Stock - Common	9,755,000.00	9,755,000.00	3,400,000.00	3,400,000.00	3,400,000.00	3,400,000.00
Capital Stock - Preferred			1,422,000.00	1,422,000.00	1,422,000.00	1,422,000.00
1st Mortgage Bonds,	11,291,000.00	11,291,000.00	11,291,000.00	11,291,000.00	11,291,000.00	11,291,000.00
2nd Mortgage Bonds,	10,391,000.00	10,391,000.00				
3rd Mortgage Bonds,	2,966,052.50	2,966,052.50				
Colorado Bridge Bonds	198,000.00	198,000.00	198,000.00	198,000.00	198,000.00	198,000.00
1st Refunding Mortgage Bonds,1911			13,750,000.00	13,750,000.00	13,750,000.00	13,750,000.00
1st Refunding Mortgage Bonds,1913					506,000.00	506,000.00
1st Refunding Mortgage Bonds,1914						535,000.00
Total Stocks and Bonds,	$34,601,052.50	$34,601,052.50	$30,061,000.00	30,061,000.00	$30,567,000.00	$31,102,000.00
Receivers' Equipment Notes			266,000.00	247,000.00	209,000.00	171,000.00
San Antonio Depot Bonds			28,000.00	14,000.00		
Equipment Gold Notes, Series A						# 950,000.00
Equipment Notes:						
American Hoist & Derrick Co.						# 4,900.00
Industrial Works,						# 14,100.00
TOTAL CAPITAL DEBT	$34,601,052.50	$34,601,052.50	$30,355,000.00	30,322,000.00	$30,776,000.00	$32,242,000.00
Total Valuation of I&GN Ry on Sept.27th, 1911 by RR.C.of Texas			30,365,047.97	30,365,047.97	30,365,047.97	30,365,047.97
Valuation Order October 31, 1912					596,273.85	596,273.85
Valuation Order June 9th, 1913					589,605.17	589,605.17
Valuation Order June 27th, 1913					630,708.01	630,708.01
Total to June 30, each year			$30,365,047.97	30,365,047.97	$32,181,635.00	$32,181,635.00

Capital Obligations paid off under R.R.C.of Texas Valuation, for which no additional securities issued	123,000.00
Balance Valuation Order of Sept. 27, 1911 for which no securities have yet been issued	10,047.97
Balance Valuation Order of Oct. 31, 1912 for which no securities have yet been issued	90,273.85
Balance Valuation Order of June 9, 1913 for which no securities have yet been issued	589,605.17
Balance Valuation Order of June 27, 1913 for which no securities have yet been issued	95,708.01
Total Valuation by R.R.C.of Texas not yet covered by issue of Securities	$908,635.00

Equipment covered by these Notes has not been valued by the Commission.

bookkeeping, the witness thought in 1907, before which period additions and betterments were charged to the expense of operation, but that that matter had been corrected in the figures submitted; that also before the change had been made, hire of equipment, rentals, switching and a great many things of that kind were charged to operating expense and were afterwards taken out; that if there should be an error in his understanding it would involve a change in his figures.

NOTE.—Further on in the evidence the witness changed his figures to some extent and recalculated this matter, as appears below.

He testified that the First Mortgage of 1879 bore six per cent, the Colorado Bridge Bonds seven, which was an unusually high rate; that four per cent from his experience would be an excessive amount to expect from dividends on railroad properties in Texas, but that the I. & G. N. had never paid any dividends, except one year and that over the United States it is rather the exception and the rule that seven per cent dividends on railroad stocks, the witness thought, would be greatly in excess of what they generally paid, but that he did not think that that was true in regard to railroad bonds; that he did not know the current rate on railroad loans of say $11,000,000 in the United States, and did not know that he had ever heard of a railroad in the United States paying as much as seven per cent dividends on stock. That there had been an inventory of the property of the I. & G. N. Railroad in Harris County, made at the time of the Bonner and Eddy Receivership, but not kept up, and that he did not know whether there was any record showing the values of property in this County; that he would determine up to what year the cost of betterments was charged to operating expenses, but thought it was up to 1905.

239 (8) W. J. Werner was recalled by plaintiffs and stated that he thought it was in the year 1907 a change was made under the Interstate Commerce Commission direction in the bookkeeping, which eliminated the item of hire of equipment from what was known as operating expense, and directed that it be charged against income as a capital charge; that in Mr. Maury's statement hire of equipment had been deducted, and the result would be the same whether it is charged to operating equipment or capital account; that Mr. Maury's figures as to additions and betterments taken from the books before the change was made in bookkeeping would need readjustment if he had followed the books, unless he had made the readjustment.

The plaintiffs next introduced in the evidence sheet showing capital debt and other matters brought down to June 30, 1914, which was admitted over the objection and exception of the defendants, and is as follows:

(Here follows reproduction of sheet showing capital debt, marked page 240.)

241 The witness stated that this sheet showed the item of $123,000 capital obligations paid off under the Railroad Commission of Texas valuations, against which no additional securities had been issued at that time; and also as to the balance of four valuation orders that the statement meant that no securities, stocks or bonds had been issued for such balances although approved by the Railroad Commission. Except Receivers' certificates and obligations for equipment purchased, there had been no securities issued since June 30, 1914.

The plaintiffs next introduced statement from the books of the Company showing stocks and bonds outstanding on June 30th of each year except as noted, which statement is as follows:

(Here follows reproduction of statement showing stocks and bonds outstanding, marked page 242.)

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY

Jas. A. Baker & Cecil A. Lyon, Receivers

STOCKS AND BONDS - Outstanding on June 30th of each year except as noted

	Capital Stock	MORTGAGE BONDS				Total Mortgage Bonds	TOTAL Stock & Bond Debt
		1st-Nov 1,1879	2nd-June 5 1881	3rd-Mch 1,92	Colo. Edge Jul 1 1880		
1889 Feb 21st, -	$9,755,000.00	$ 7,954,000.00	$ 7,054,000.00	$	$	$15,008,000.00	$24,763,000.00
1890 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00			15,008,000.00	24,763,000.00
1891 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00			15,008,000.00	24,763,000.00
1892 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00			15,008,000.00	24,763,000.00
1893 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00	2,689,937.50		17,697,937.50	27,452,937.50
1894 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00	2,699,260.00		17,707,260.00	27,462,260.00
1895 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00	2,716,007.00		17,724,007.50	27,479,007.00
1896 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00	2,727,887.50		17,735,887.50	27,490,887.50
1897 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00	2,727,887.50	198,000.00	17,933,887.50	27,688,887.50
1898 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00	2,728,052.50	198,000.00	17,934,052.50	27,689,052.50
1899 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00	2,728,547.50	198,000.00	17,934,547.50	27,689,547.50
1900 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00	2,728,547.50	198,000.00	17,934,547.50	27,689,547.50
1901 - - - - - -	9,755,000.00	7,954,000.00	7,054,000.00	2,721,052.50	198,000.00	17,927,052.50	27,682,052.50
1902 - - - - - -	9,755,000.00	9,795,000.00	8,895,000.00	2,721,052.50	198,000.00	21,609,052.50	31,364,052.50
1903 - - - - - -	9,755,000.00	10,742,000.00	9,842,000.00	2,721,052.50	198,000.00	23,503,052.50	33,258,052.50
1904 - - - - - -	9,755,000.00	11,291,000.00	10,391,000.00	2,966,052.50	198,000.00	24,846,052.50	34,601,052.50
1905 - - - - - -	9,755,000.00	11,291,000.00	10,391,000.00	2,966,052.50	198,000.00	24,846,052.50	34,601,052.50
1906 - - - - - -	9,755,000.00	11,291,000.00	10,391,000.00	2,966,052.50	198,000.00	24,846,052.50	34,601,052.50
1907 - - - - - -	9,755,000.00	11,291,000.00	10,391,000.00	2,966,052.50	198,000.00	24,846,052.50	34,601,052.50
1908 - - - - - -	9,755,000.00	11,291,000.00	10,391,000.00	2,966,052.50	198,000.00	24,846,052.50	34,601,052.50
1909 - - - - - -	9,755,000.00	11,291,000.00	10,391,000.00	2,966,052.50	198,000.00	24,846,052.50	34,601,052.50
1910 - - - - - -	9,755,000.00	11,291,000.00	10,391,000.00	2,966,052.50	198,000.00	24,846,052.50	34,601,052.50
1911 - Sept.15th	9,755,000.00	11,291,000.00	10,391,000.00	2,966,052.50	198,000.00	24,846,052.50	34,601,052.50
1912 - Sept.16th	4,822,000.00	11,291,000.00	13,750,000.00#		198,000.00	25,239,000.00	30,061,000.00
1912 - - - - - -	4,822,000.00	11,291,000.00	13,750,000.00#		198,000.00	25,239,000.00	30,061,000.00
1913 - - - - - -	4,822,000.00	11,291,000.00	14,256,000.00#		198,000.00	25,745,000.00	30,567,000.00
1914 - - - - - -	4,822,000.00	11,291,000.00	14,791,000.00#		198,000.00	26,280,000.00	31,102,000.00

I & G N Railway First Refunding Mortgage Bonds

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY

Jas. A. Baker and Cecil A. Lyon, Receivers

(807) Total Stock and Bonds - Stock and Bonds Per Mile of Road Owned - Per Cent. of Net Income to Total Stock and Bonds.

JUNE 30th	Miles of Road Owned	Net Income Available for Interest A&B etc	Total Stocks and Bonds	Stocks & Bonds Per Mile of Road Owned	Per Cent Net Income To Total Stock & Bonds	Valuation Railroad Commission of Texas	Valuation Per Mile of Road	Per Cent. of Net Income to RR Commission Valuation
1890 - - - -	775.4	727,680.18	24,763,000.00	31,935.78	2.94			
1891 - - - -	775.4	301,415.80	24,763,000.00	31,935.78	1.22			
1892 - - - -	775.4	457,643.39	24,763,000.00	31,935.78	1.85			
1893 - - - -	775.4	1,301,631.40	27,452,937.50	35,404.87	4.74			
1894 - - - -	775.4	451,066.69	27,462,260.00	35,416.89	1.64			
1895 - - - -	775.4	1,057,360.01	27,479,007.50	35,438.49	3.84			
1896 - - - -	775.4	659,848.71	27,490,887.50	35,453.81	2.40			
1897 - - - -	775.4	748,438.25	27,688,887.50	35,709.17	2.70			
1898 - - - -	775.4	1,076,335.90	27,689,052.50	35,709.34	3.89			
1899 - - - -	775.4	1,114,033.99	27,689,547.50	35,710.02	4.01			
1900 - - - -	775.4	1,144,174.39	27,689,547.50	35,710.02	4.13			
1901 - - - -	837.4	1,287,970.39	27,682,052.50	33,057.16	4.65			
1902 - - - -	956.62	1,154,412.82	31,364,052.50	32,786.32	3.68			
1903 - - - -	1,051.10	1,201,822.41	33,258,052.50	31,641.19	3.61			
1904 - - - -	1,106.00	1,186,630.66	34,601,052.50	31,284.85	3.43			
1905 - - - -	1,106.00	1,235,393.87	34,601,052.50	31,284.85	3.57			
1906 - - - -	1,106.00	645,823.61	34,601,052.50	31,284.85	1.87			
1907 - - - -	1,106.00	1,930,030.98	34,601,052.50	31,284.85	5.58			
1908 - - - -	1,106.00	- 395,437.98	34,601,052.50	31,284.85	-1.14			
1909 - - - -	1,106.00	782,508.43	34,601,052.50	31,284.85	2.26			
1910 - - - -	1,106.00	971,160.91	34,601,052.50	31,284.85	2.81			
1911 - - - -	1,106.00	1,234,897.45	34,601,052.50	31,284.85	3.57			
1912 - - - -	1,106.00	2,203,593.36	30,061,000.00	27,179.93	7.33	30,365,047.97	27,418.72	7.27
1913 - - - -	1,106.00	1,668,236.40	30,567,000.00	27,637.43	5.46	32,181,635.00	29,097.32	5.18
1914 - - - -	1,106.00	878,327.60	31,102,000.00	28,121.16	2.82	32,181,635.00	29,097.32	2.78
1911-2½ Mos July to 9-15th - - - - - -		264,897.56	34,601,052.50	31,284.85	0.07			.89
1911-2 9½ Mos.9-1 to 6-30		1,938,695.80	30,061,000.00	27,179.93	6.45	30,365,047.97	27,418.72	6.38

- Deficit

243 Plaintiffs next introduced sheet showing stocks and bonds per mile of road owned and per cent of net income to total of stocks and bonds from 1890 to 1914. This was introduced subject to correction and verification down to the year 1907 under the old system of bookkeeping, before which time some betterments were erroneously charged to income. The witness Werner stated that this statement was correct from his books, and that in the year 1907 he thought the Interstate Commerce Commission issued its accounting classification prohibiting the charging of any betterment to operating expense. Prior to that time it was optional to so charge it. Counsel for plaintiffs then stated that he offered this table from 1907 forward, and the witness Werner stated that it could be corrected back of 1907, and further that the fiscal year or the calendar year of 1912 was the most prosperous year in the whole experience of the I. & G. N. properties as reflected by its books; further that for the calendar year ending December 31, 1914, the net income was between $60,000 and $70,000 after deducting taxes, hire of equipment, and rentals for general facilities, while the statement for the fiscal year ending June 30, 1914, reflects operating income.

Here the last above mentioned sheet is as follows:

(Here follows statement showing stocks and bonds for mile of road, marked page 244.)

245 Plaintiffs next introduced sheet showing operating revenues for twenty-five fiscal years, 1890 to 1914 inclusive, and it is as follows:

(Here follows statement showing operating revenues, etc., marked page 246.)

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

JAS. A. BAKER & CECIL A. LYON, RECEIVERS.

OPERATING REVENUES FOR 25 FISCAL YEARS, ENDED JUNE 30TH, 1890 to 1914.

Year	Average Miles Operated	Freight	Passenger and Baggage	Mail	Express	Miscellaneous	Total Operating Revenues	Net Operating Revenues
1890	775.4	2,714,378.18	778,476.47	92,678.19	67,388.70	30,470.82	3,683,392.36	740,573.40
1891	775.4	2,511,886.66	889,199.03	116,781.35	70,715.44	20,697.39	3,609,279.86	315,060.10
1892	775.4	2,463,597.03	872,527.05	123,036.60	76,195.49	33,334.10	3,586,690.26	582,486.14
1893	775.4	2,856,714.45	864,057.30	123,036.60	80,421.35	41,125.23	3,965,354.93	1,312,047.84
1894	775.4	2,105,489.27	781,560.98	123,036.60	68,928.79	28,747.83	3,107,763.47	738,317.17
1895	775.4	2,513,773.95	750,763.76	131,626.80	65,826.54	29,661.87	3,491,652.92	1,125,263.48
1896	801.6	2,171,114.74	769,507.69	132,624.38	76,140.82	24,724.14	3,174,111.77	691,631.50
1897	825.4	2,734,618.95	694,717.32	136,870.84	69,959.78	27,436.04	3,653,302.93	841,790.43
1898	825.4	2,766,140.18	758,330.76	137,947.98	74,579.46	32,707.20	3,769,705.58	1,174,475.45
1899	825.4	2,953,145.79	832,673.12	163,269.22	74,394.24	65,718.69	4,089,204.06	1,184,239.36
1900	825.4	2,993,411.47	905,723.57	163,314.12	81,941.34	87,293,43	4,231,583.93	1,188,687.76
1901	830.95	3,556,197.66	1,057,857.70	163,230.41	103,481.07	107,757.49	4,988,524.33	1,347,531.97
1902	927.7	3,513,707.48	1,090,896.39	163,729.16	108,397.49	179,227.81	5,055,958.33	1,263,070.59
1903	1,023.02	3,869,630.58	1,096,363.03	177,567.57	114,821.77	271,179.86	5,529,562.81	1,518,384.86
1904	1,143.23	4,037,485.13	1,146,737.83	179,905.39	117,651.38	258,861.97	5,740,641.70	1,313,155.41
1905	1,159.5	4,466,313.62	1,308,565.78	183,119.88	137,208.50	221,101.57	6,316,309.33	1,589,638.87
1906	1,159.5	4,820,364.13	1,414,242.60	183,113.05	152,544.85	235,168.40	6,805,433.03	865,403.17
1907	1,159.5	6,319,690.07	1,757,918.29	227,183.38	166,038.49	356,134.84	8,826,959.07	2,127,562.99
1908	1,159.5	4,741,710.81	1,700,737.63	220,637.53	145,694.54	113,497.13	6,922,267.64	363,560.21
1909	1,159.5	5,846,418.86	1,754,841.24	221,716.38	151,791.82	133,170.89	8,097,939.19	1,499,793.91
1910	1,159.5	6,092,217.98	1,969,613.00	220,530.91	151,530.34	132,973.64	8,566,865.87	1,517,078.47
1911	1,159.5	6,402,506.36	2,172,393.03	249,935.02	165,538.83	137,561.42	9,127,834.66	1,899,906.68
1912	1,159.5	7,408,679.73	2,329,150.75	249,822.72	188,750.48	182,369.91	10,358,773.59	2,809,999.14
1913	1,159.5	8,074,686.37	2,500,296.39	254,979. [illegible]	35[illegible] 607.89	177,994.20	11,260,564.82	2,733,085.40
1914	1,159.5	7,024,295.35	2,274,387.28	262,979. 2	206,707.17	172,704.04	9,941,373.76	1,919,794.25
								32,572,602.65

Page 24a

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY

Jas. A. Baker and Cecil A. Lyon, Receivers.

No 9

OPERATING EXPENSES FOR 25 YEARS, ENDED JUNE 30th., 1890 to 1914.

YEAR	AVERAGE MILES OPERATED	MAINTENANCE OF WAY AND STRUCTURES	MAINTENANCE OF EQUIPMENT	TRAFFIC EXPENSES	TRANSPORTATION EXPENSES	GENERAL EXPENSES	TOTAL OPERATING EXPENSES	RATIO OF OPERATING EXPENSES TO GROSS EARNINGS
1890	775.4	974,175.34	451,173.54	--- --- --	1,340,015.56	204,454.52	2,942,818.96	79.89
1891	775.4	1,081,491.97	566,151.46	--- --- --	1,452,663.03	193,913.30	3,294,219.76	91.27
1892	775.4	975,289.46	433,441.35	--- --- --	1,415,124.72	162,348.59	2,986,204.12	83.68
1893	775.4	616,130.05	368,181.28	--- --- --	1,478,101.02	190,894.74	2,653,307.09	66.91
1894	775.4	597,734.60	342,546.51	--- --- --	1,279,135.50	150,029.69	2,369,446.30	76.24
1895	775.4	551,353.48	403,529.34	--- --- --	1,318,471.83	93,034.79	2,366,389.44	67.77
1896	801.6	616,600.03	460,259.38	--- --- --	1,310,107.25	95,523.61	2,482,490.27	78.21
1897	825.4	742,147.60	471,856.35	--- --- --	1,465,470.56	132,037.99	2,811,512.50	76.96
1898	825.4	637,284.05	454,797.17	--- --- --	1,409,901.14	93,247.77	2,595,230.13	68.84
1899	825.4	700,738.87	503,625.14	--- --- --	1,587,401.66	113,198.83	2,904,964.50	71.04
1900	825.4	701,951.57	510,894.13	--- --- --	1,693,005.75	137,044.72	3,042,896.17	71.91
1901	830.95	976,106.87	527,108.59	--- --- --	1,984,988.72	152,798.18	3,641,002.36	72.99
1902	927.7	965,419.33	561,398.01	--- --- --	2,084,975.50	181,094.90	3,792,887.74	75.02
1903	1,023.02	989,259.45	685,366.11	--- --- --	2,347,493.82	189,058.57	4,211,177.95	76.15
1904	1,143.23	791,701.26	720,322.27	--- --- --	2,696,414.40	219,048.36	4,427,486.29	77.13
1905	1,159.5	876,394.54	779,224.56	--- --- --	2,844,700.34	226,367.02	4,726,686.46	74.83
1906	1,159.5	1,757,751.35	1,009,853.78	--- --- --	2,943,835.07	228,589.66	5,940,029.86	87.28
1907	1,159.5	1,166,878.75	1,192,200.97	--- --- --	4,080,159.80	260,156.56	6,699,396.08	75.90
1908	1,159.5	1,344,812.55	1,453,302.64	174,507.87	3,381,626.45	204,457.92	6,558,707.43	94.75
1909	1,159.5	1,467,426.88	1,336,805.31	200,054.70	3,346,317.92	247,540.47	6,598,145.28	81.48
1910	1,159.5	1,438,106.56	1,386,877.90	229,286.84	3,736,170.13	259,345.97	7,049,787.40	82.29
1911	1,159.5	1,434,907.48	1,397,196.90	235,476.67	3,888,567.90	271,779.03	7,227,927.98	79.19
1912	1,159.5	1,258,299.76	1,340,618.94	279,649.73	4,296,479.13	373,726.89	7,548,774.45	72.87
1913	1,159.5	1,472,196.52	1,557,565.44	319,663.33	4,796,525.03	381,529.10	8,527,479.42	75.73
1914	1,159.5	1,633,201.83	1,110,368.98	321,038.03	4,556,773.12	400,197.55	8,021,579.51	80.69

247 The witness Werner had made such statement from his books, and stated that gross operating revenue represents the revenue from freight and passenger, mail, express and miscellaneous transportation which the Company was entitled to receive, while net operating revenue represents the amount of gross operating revenue left after deducting costs of operation but not after deducting fixed charges like taxes or rent or hire of equipment.

Plaintiffs next introduced sheet showing operating expenses for twenty-five years ending June 30, 1914, with ratio of operating expenses to gross revenue, which is as follows:

(Here follows above-mentioned statement, marked page 248.)

249 The witness Werner explained that by ratio of operating expenses railroad men meant the number of cents out of each dollar of revenue spent for the cost of operation. This would be the numerator, where the whole dollar would be the denominator, and that from 65 to 70 per cent, according to the witness' understanding, would be a reasonable ratio. As to what a reasonable ratio was, the defendants objected and over their objection and exception the statement was made, the witness stating that he testified as a railroad man experienced in the business. Witness further testified that the I. & G. N. Railway cannot make 7 per cent upon its capital investment; that in operating expenses, taxes, interest and dividends and joint facility rentals are not included; nor in the gross operating income *is* included rents of our facilities, but they are included in gross earnings, but in gross earnings, per diems, and hire of equipment paid us by other railroads are not included.

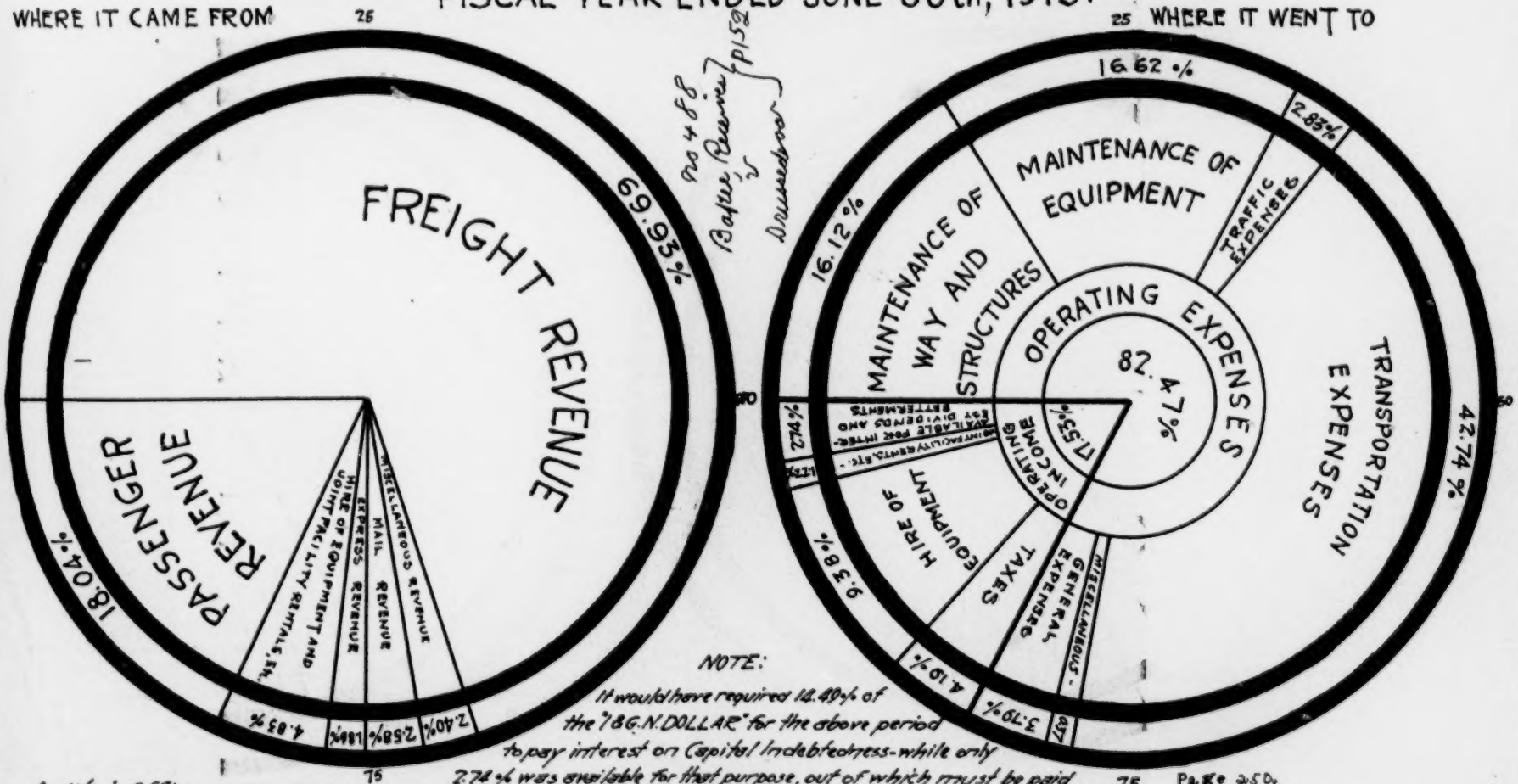
The witness produced what he called the "I. & G. N. Dollar", being a graphic representation of income and the disposition thereof, and the same was introduced in the evidence, representing the fiscal year ending June 30, 1915, as follows:

(Here follows diagram marked page 250.)

(30-19)

THE I&GN DOLLAR.

FISCAL YEAR ENDED JUNE 30th, 1915.



Auditor's Office
July 30th 1915.

NOTE:
It would have required 12.49% of the "I&G.N. DOLLAR" for the above period to pay interest on Capital Indebtedness - while only 2.74% was available for that purpose, out of which must be paid the cost of Additions and Betterments.

Page 250.

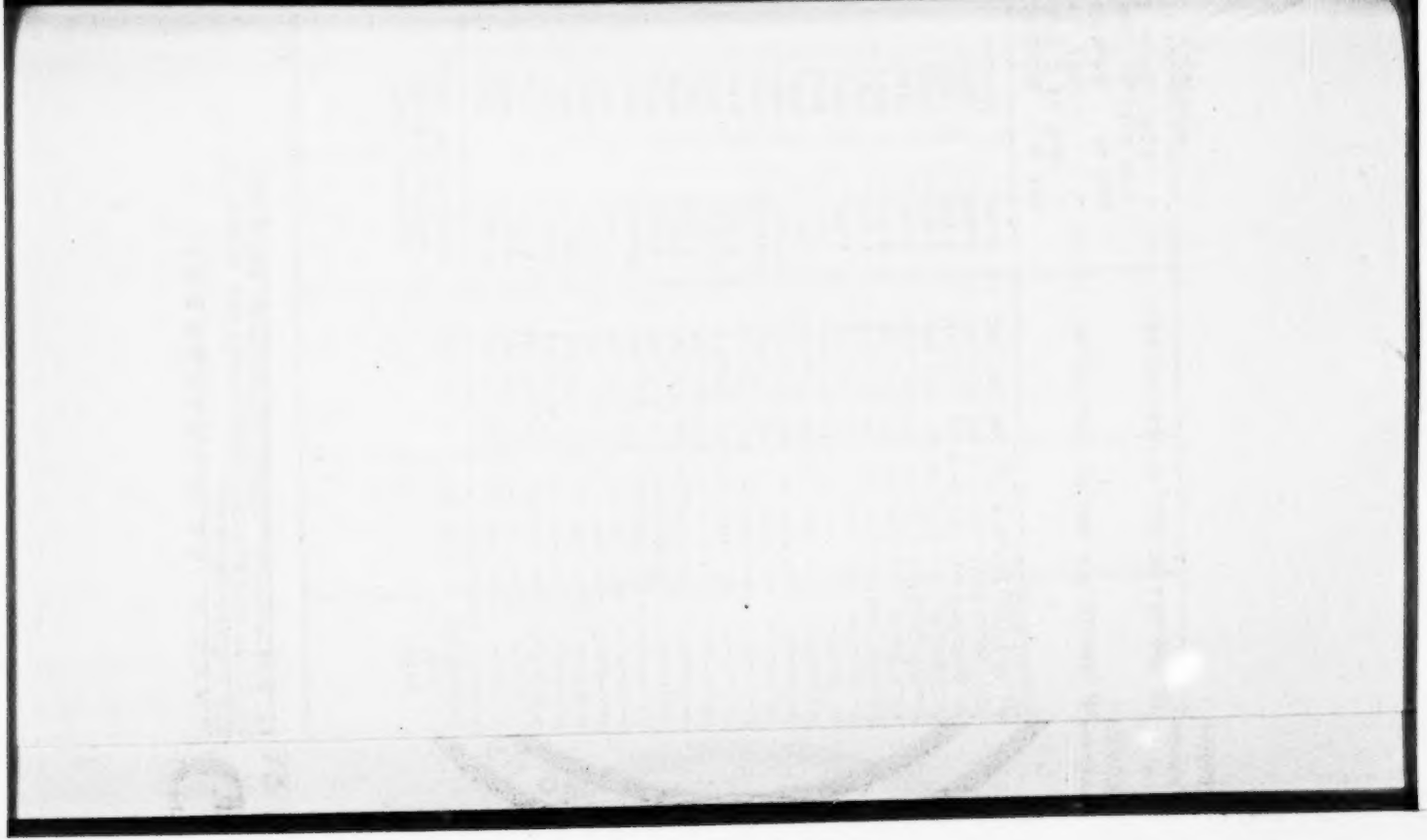
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY

JAS. A. BAKER & CECIL A. LYON, RECEIVERS.

TAXES AND OTHER OPERATING CHARGES TO BE DEDUCTED FROM INCOME BEFORE ARRIVING AT THE AMOUNT AVAILABLE FOR INTEREST, DIVIDENDS, BETTERMENTS, ETC., FOR 25 FISCAL YEARS, ENDED JUNE 30TH, 1890 to 1914.

YEAR ENDED JUNE 30	AVERAGE MILES OPERATED	TAXES	RENTALS	Hire of EQUIPMENT	OTHER Operating CHARGES	Total Taxes & other Operating CHARGES	Gross Corporate INCOME	Balance of Income available for Interest, ADDITIONS, etc	Income per Mile of Road Owned Available for Interest, Additions, etc.
1890	775.4	25,193.32	- -- --	- - - -	- - - -	25,193.32	752,873.40	727,680.18	938.46
1891	775.4	27,581.63	- --- --	- - - -	- - - -	27,581.63	328,997.43	301,415.80	388.72
1892	775.4	28,951.35	- --- --	- - - -	250,016.03	278,967.38	736,610.77	457,643.39	590.20
1893	775.4	28,677.60	- --- --	- - - -	--- --- --	28,677.60	1,330,309.00	1,301,631.40	1,678.66
1894	775.4	30,933.91	- --- --	- - - -	260,243.05	291,176.96	742,243.65	451,066.69	581.72
1895	775.4	29,310.15	- --- --	- --- --	53,853.80	83,163.95	1,139,523.96	1,056,360.01	1,362.34
1896	801.6	35,544.38	31,000.00	- --- --	-- --- --	66,544.38	726,393.09	659,848.71	850.98
1897	825.4	36,869.33	62,000.00	- --- --	-- --- --	98,869.33	847,307.58	748,438.25	965.23
1898	825.4	38,711.66	62,000.00	- --- --	-- --- --	100,711.66	1,177,047.56	1,076,335.90	1,388.11
1899	825.4	43,528.92	31,000.00	- --- --	-- --- --	74,528.92	1,188,562.91	1,114,033.99	1,436.72
1900	825.4	48,140.73	- --- --	- --- --	-- --- --	48,140.73	1,193,315.13	1,144,174.39	1,475.59
1901	830.95	70,894.03	- --- --	- --- --	-- --- --	70,894.03	1,358,864.42	1,287,970.39	1,538.06
1902	927.7	117,571.60	- --- --	- --- --	-- --- --	117,571.60	1,271,984.42	1,154,412.82	1,306.76
1903	1,023.03	125,730.86	- --- --	- --- --	-- --- --	125,730.86	1,327,553.27	1,201,822.41	1,143.49
1904	1,143.23	136,078.42	- --- --	- --- --	-- --- --	136,078.42	1,322,709.08	1,186,630.66	1,072.90
1905	1,159.5	148,635.66	- --- --	- --- --	216,044.64	364,680.30	1,600,074.17	1,235,393.87	1,321.33
1906	1,159.5	144,792.31	- --- --	- --- --	78,794.04	223,586.35	869,409.96	645,823.61	655.17
1907	1,159.5	177,553.15	- --- --	- --- --	24,508.92	202,062.07	2,132,093.05	1,930,030.98	1,745.05
1908	1,159.5	278,330.37	67,513.36	240,130.29	197,376.36	783,350.38	387,912.40	-395,437.98	-357.54
1909	1,159.5	241,244.65	97,358.31	237,070.83	188,133.13	763,806.92	1,546,315.35	782,508.43	707.51
1910	1,159.5	252,980.54	104,786.11	214,776.45	32,521.46	605,064.56	1,576,225.47	971,160.91	878.08
1911	1,159.5	254,344.32	107,562.10	317,283.59	35,630.98	714,760.99	1,949,658.44	1,234,897.45	1,116.54
1912	1,159.5	309,000.00	106,751.04	485,356.39	40,590.49	941,697.92	3,145,291.28	2,203,593.36	1,992.40
1913	1,159.5	340,000.00	105,284.51	751,417.67	1,124.06	1,197,826.24	2,866,032.64	1,668,236.40	1,508.35
--1914	1,159.5	339,841.24	107,881.09	647,286.14	9,991.61	1,105,000.08	1,983,327.68	878,327.60	794.15
1911-12, 2½ Mos. July 1 to Sept 15, 1911 - - -		56,500.00	19,399.95	51,768.12	40,590.49	168,258.56	453,156.12	284,897.56	239.51
1911-12 9½ Mos Sep. 16, 1911 to J ne 30, 1912 - -		252,500.00	87,351.09	433,588.27	-- --- --	773,439.36	2,713,135.16	1,938,695.80	1,752.89

- DEFICIT



251 The witness stated that this was correct from his books and made by himself.

The plaintiffs next introduced in evidence a table of taxes and other operating charges to be deducted from income before arriving at the amount available for interest, dividends, betterments, etc., covering twenty-five fiscal years to June 30, 1914, and which table is as follows:

(Here follows reproduction of statement showing taxes and other operating charges to be deducted from income, marked page 252.)

253 The plaintiffs next introduced table showing tables for year ending June 30, 1914, compared with the year ending June 30, 1900, and June 30, 1909, etc., which table is as follows:

(Here follows table showing taxes for year ending June 30, 1914, etc., marked page 254.)

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY,

Jas. A. Baker and Cecil A. Lyon, Receivers,

(4012)

Statement of TAXES for year ended June 30th. 1914 compared with year ended June 30th. 1900, also compared with the year ended June 30th. 1909, and per mile of road for the same years.

	1914	1900	INCREASE	DECREASE	PER CENT
Miles of Road - Operated	1159.5	#329.1	830.4		252.8
Miles of Road - Owned	1106.0	#279.1	826.9		296.3
United States Corporation or Income Tax					
Texas State Franchise Tax	$ 3,225.00	$ 160.00	$ 3,065.00		1,915.6
Texas INTANGIBLE ASSETS TAX	131,889.68		131,889.69		
Texas State, County, School, Municipal, etc. Taxes.	261,378.23	47,980.73	213,397.50		448.8
Total Taxes on Railroad and Franchises	$396,492.91	$ 48,140.73	$348,352.18		723.6
Per Miles of Road - Operated	341.95	146.28	195.67		133.8
Per Miles of Road - Owned	358.49	172.49	186.00		107.8

	1914	1909	INCREASE	DECREASE	PER CENT
Miles of Road - Operated	1159.5	1159.5			
Miles of Road - Owned	1106.0	1106.0			
United States Corporation or Income Tax					
Texas State Franchise Tax	$ 3,225.00	$ 2,913.75	$ 311.25		10.7
Texas INTANGIBLE ASSETS TAX	131,889.68	92,383.56	39,406.12		42.7
Texas State, County, School, Minicipal, etc. Taxes	261,378.23	145,947.34	115,430.89		79.1
Total Taxes on Railroad and Franchises	$396,492.91	$241,244.65	$155,148.26		64.3
Per Mile of Road - Operated	341.95	208.06	133.89		64.3
Per Mile of Road - Owned	358.49	218.12	140.37		64.3

Note # The 496.3 miles of International RR. Longview to Laredo was exempted for taxes until Aug.1900.

254

The amounts of Taxes shown are ACTUAL PAYMENTS and not the estimated accruals shown under the Income Accounts.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.

Jas. A. Baker and Cecil A. Lyon, Receivers,

LOSS AND DAMAGE -- INJURIES TO INDIVIDUALS, ETC.

YEAR ENDED JUN. 30	MILES OF ROAD OPERATED	CLEARING WRECKS	LOSS AND DAMAGE TO FREIGHT	LOSS AND DAMAGE TO BAGGAGE	DAMAGE TO PROPERTY	DAMAGE TO STOCK ON RIGHT OF WAY	TOTAL LOSS & DAMAGE ETC.	INJURIES TO INDIVIDUALS	GRAND TOTAL
1890	775.4	-- --- ---	--- --- --	-- --- --	-- --- --	--- --- --	-- --- --	-- --- --	--- --- --
1891	775.4	-- --- --	--- --- --	-- --- --	-- --- --	--- --- --	67,493.26	68,664.35	136,157.61
1892	775.4	-- --- --	--- --- --	-- --- --	-- --- --	--- --- --	62,022.13	39,044.46	101,066.59
1893	775.4	-- --- --	--- --- --	-- --- --	-- --- --	--- --- --	75,668.10	23,091.45	98,759.55
1894	775.4	-- --- --	--- --- --	-- - - --	-- --- --	--- --- --	78,380.43	50,775.89	129,156.32
1895	775.4	-- --- --	--- --- --	-- --- --	-- --- --	--- --- --	61,634.18	50,799.92	112,434.10
1896	801.6	-- --- --	--- --- --	-- --- --	-- --- --	--- --- --	67,144.84	35,398.07	102,542.91
1897	825.4	-- --- --	--- --- --	-- --- --	-- --- --	--- --- --	69,900.69	24,606.51	94,507.20
1898	825.4	-- --- --	--- --- --	-- --- --	-- --- --	--- --- --	60,602.62	43,648.46	104,251.08
1899	825.4	-- --- --	--- --- --	-- --- --	-- --- --	--- --- --	45,185.49	67,183.39	112,368.88
1900	825.4	5,220.01	35,441.09	435.92	2,592.55	18,887.76	62,577.33	92,341.05	154,918.38
1901	830.95	6,698.79	46,340.71	569.98	3,389.87	24,696.54	81,695.89	111,354.56	193,050.45
1902	927.7	5,100.77	57,817.17	711.14	4,229.27	30,812.75	98,671.10	113,238.27	211,909.37
1903	1,023.02	14,248.13	29,296.28	1,208.01	7,119.27	50,019.78	101,891.47	141,347.36	243,238.83
1904	1,143.23	13,448.55	42,124.67	733.37	8,692.15	36,817.69	101,816.43	153,259.46	255,075.89
1905	1,159.5	14,938.74	50,114.97	928.84	3,896.62	38,898.12	108,777.39	138,405.01	247,182.30
1906	1,159.5	23,753.87	51,567.39	1,105.02	3,245.38	41,030.84	120,702.50	98,989.36	219,691.86
1907	1,159.5	32,030.07	87,127.29	1,575.93	6,306.61	51,925.96	178,965.88	172,186.86	351,152.74
1908	1,159.5	28,113.51	167,310.46	792.85	6,492.38	42,110.80	244,820.00	127,801.30	372,621.30
1909	1,159.5	20,041.11	135,414.01	580.55	5,401.50	39,172.19	200,609.36	85,668.55	286,277.91
1910	1,159.5	6,973.00	136,579.22	1,821.14	13,283.99	48,260.17	206,917.52	252,134.04	459,051.56
1911	1,159.5	8,885.42	149,002.85	1,098.16	13,500.81	55,146.68	227,633.91	230,334.72	457,968.64
1912	1,159.5	14,883.44	155,198.32	1,100.61	10,706.59	59,036.40	240,925.36	257,683.77	498,609.13
1913	1,159.5	27,665.00	204,207.07	1,447.60	4,007.17	76,816.02	314,142.86	214,688.49	528,831.35
1914	1,159.5	34,721.68	246,780.06	883.20	7,018.43	77,273.42	366,676.79	208,947.30	575,624.09

255 The plaintiffs next introduced table showing the experience of the properties from 1900 forward, account of loss and damage, injuries to individuals, etc., which table is as follows:

(Here follows table showing loss and damage—injuries to individuals, etc., marked page 256.)

257 To the introduction of this document the defendants objected, and over their objection and exception it was overruled.

Witness Werner then stated that in railroad parlance hire of equipment is the rental charge for the use of cars owned by other railroads; that the I. & G. N. is charged 45 cents per day for use of cars of other roads from the time they reach its lines until they are returned to the connecting carrier, and that this is known as per diem, and that it makes a corresponding collection from other companies using its cars on the same basis, but that it pays out more than it collects because it is short of equipment.

258 (9) T. C. Dunn having been duly sworn, as all the witnesses listed above and below were sworn, testified: He is the Vice-President of the Union National Bank, one of the largest of the banks in Houston, and has been engaged in banking about thirty-five years, and it is his profession.

The witness further testified: That he has often had occasion to determine and pass on and investigate values of stocks and bonds and investments in Texas.

He was then asked to state what he considered a conservative, fair income on a Texas investment, to which question the defendants objected and offered their objections and exception. The question was again asked in this form: "What would be a fair, conservative income on stocks or bonds or other loans?" The witness answered, "something around 6% or 7%."

It was then stated to the witness that the Railroad Commission of Texas had made a valuation of the physical properties of the I. & G. N. Railway in round numbers, $32,000,000.00; that these properties consist of a going railroad and its equipment, about 1,106 miles of main track in Texas; that for the last seven years it has made an income, on the Commission valuation, of 3½% average for seven years; that it is now in default on what is the Second Mortgage on the properties, which has been foreclosed for about $14,000,000.00 including defaulted interest, which was in default from August 1st, payable semi-annually at 5%; that a decree of foreclosure was entered in May, 1915, and an order for it to be sold at some time to be set by the court; that there is a First Mortgage on the property of about $11,200,000.00 on which interest was paid semi-annually, and on May, 1915 paid out of Receivers' certificates; that in June, 1915, the floating debt of the Railroad properties, including some indebtedness of the Receivers, was over $2,000,000.00, and that the aggregate mortgage lien indebtedness, not including defaulted interest, is approximately $28,000,000.00; that the valuation as stated by the Railroad Commission above was $32,000,000.00; that the stock is of the

259 par — of $4,822,000.00, making an aggregate of stocks and bonds slightly below the Railroad Commission's valuations. Having made this statement the witness was asked to state what he would consider to have been the value of that stock in June, 1915, if any, and its value now, if any. To this question the defendants objected as on different grounds, and that the witness was not quali-

fied to answer the particular question. The court stated that he would sustain the last objection until the witness went further, and the court learned what he knows about railroad stocks. The witness was then asked whether he had by observation or experience, any knowledge of the course of values of railroad stock or bonds. He answered that he had not made any study along that line at all, but he was asked whether or not, as a banker and one observing the course of the money market, what would be his position to estimate whether or not these stocks have a value, or not. He answered he did feel competent in his own mind. The question asked above was then renewed and over objections and exception of the defendants the witness said that he considered that after the foreclosure and in June, 1915, and at the present time, the stocks had no value.

Cross-examination.

The witness was asked what would be his opinion, if the lien debts were $28,000,000.00 and the property was worth $40,000,000.00. The witness answered that he would not think that the stocks would have much market value, that they might have some little intrinsic value, that he had been speaking of market value. That the stocks might have the intrinsic value represented by the real value and the market value; that he did not run across sales of stocks very often; that he did not think that they were sold down here at all; that larger loans carried, as a usual thing, lower interest, and that the largest loan of his bank was $120,000.00 at 7%, but that he did not think that his bank got more than 8% from any one; that he had no experience with loans of several million dollars, and had no occasion to investigate what interest on them should be, and
260 that as to a loan of $11,000,000.00 or $10,000,000.00, his only information would be from reading newspapers and the financial journals; that these large railroad loans carry a lower rate than small bank loans, and thought that the rate was between 3% and 5%; that he had not heard of a good many transactions lower than 3%; that his answers applied to railroad loans, he knew of no particular instance where the rate was 5%; that his impressions was that some of the roads paid dividends, that he did not know the rates, that he considered 6% or 7% would a fair investment return in Texas, but in so stating he had not particular reference to railroad transactions; that he had no idea what the Packing House and Banking House returns were in Dallas, that some businesses paid very handsomely, some not,—he knew some that paid as high as 80%, a dozen or so; that he thought himself competent to state what the ordinary return on business in this State was as based on his information, that he did not particularly refer to railroads, but included them.

Re-direct.

Quotations on railroad bonds were here offered from the Galveston News, and the witness questioned on them, over the objections and exceptions of defendants, and he testified thereon. There was shown

him a quotation on the Atlantic Coast Line, Consolidated, 4 per cent, quoted at selling at 92, and he was asked whether or not that would make about 5 per cent, and he answered that it would. These quotations were from the Galveston News of March 7th, 1916. He was next shown quotations on Baltimore & Ohio, 4½, selling at 96¾, and he said that that would make an investment return of about 5%. The rates of interest in New York were lower than in Texas, that these were New York returns. He was next shown quotations of Atchison, Topeka & Santa Fe quoted at 94⅝; said that the investment return at that price would be between 5% and 6%, but he corrected this to state that they being 4% bonds, the investment return would be 4.4 to 4.5, something like that. That outside of investment return the problem of security would be involved.

The witness was shown quotation of Central of Georgia, Con-
261 solidated, at 5%, quoted at 100½, which was taken as showing for itself. And Chesepeake & Ohio, Converted, at 4½ quoted at 83 plus, rate of interest 4½. He said that this would yield investment return around 5½. He was shown Chicago, Burlington & Quincy, Joint 4's, quoted at 98⅞; he said that that would yield the investor less than 5%. He was shown Chicago, Milwaukee & St. Paul, Converted, 5% quoted at 107. He said the investment return would be a shade off 5%, say 4-5/6. He was shown Chicago, Rock Island & Pacific 4's, quoted at 65½, and stated that that quotation would not necessarily show that the security was doubtful, but showing that it was not as good as some others.

There was then introduced in evidence quotation of Erie, general 4's, selling at 74¾; Illinois Central 4's, selling at 89; New York Central 6's, selling at 114¾; New York, New Haven & Hartford, Converted 6's, 114½; Norfolk & Western, Converted 4's, selling at 115; Northern Pacific 4's, selling at 93 and a fraction, Pennsylvania, Consolidated 4½'s, selling at 105; St. Louis, San Francisco 4's, selling at 68½; Seaboard Air Line 5's, selling at 65½; Southern Pacific, Converted 5's, selling at 104 and a fraction; Southern Railway 5's, selling at 102½; Southern Pacific, General 4's, selling at 72½; Texas & Pacific, including a Texas Railroad, rate of interest not stated, selling at 95⅞. All of these quotations were of bonds—none of them were of stocks.

The witness then stated that he did not think that Texas railroad mortgages are bought in Texas by bankers, because the rates are too low, and that the stock was not bought because it was too speculative.

Re-cross by Defendants.

The witness said that he got circulars soliciting purchase of these bond issues, but that it had not been taken up with him like the sellers meant business, and that no proposition had been made to him to sell him railroad stock; that he did not know what was in the mind of those men who had propositions made to them, but he thought they declined to buy Texas railroad stocks because
262 they were too speculative; that that was his judgment, not a matter of his direct knowledge; that they had never told him what their objections were.

(10) W. D. Sherwood, called by the plaintiffs, testified: He is a member of the firm of Sherwood & King, who are stock and bond dealers and brokers here in Houston; that he had been in the business about twelve years, his firm being successors to Wm. B. King & Company established in 1875, and that he had a half interest in Wm. B. King & Company, an old established stock brokers' firm in Houston since 1875, and that it was his business to observe the course of the market on stocks and bonds and investments, rates of interest and things of that sort, and that he had a good many transactions in railroad stocks, but very little in railroad bonds. This question was then put to the witness: "The I. & G. N. Railway Company has a first mortgage on its property of $11,291,000 on which the interest has been paid as it fell due, and a second mortgage foreclosed in May, 1915, for an amount of over $14,000,000.00 including some accrued interest, the decree of foreclosure bearing 6%, and the first mortgage bearing 6%. It also has some other small liens and some other considerable equipment certificates fixed by liens on equipment. It has an aggregate of over $28,000,000.00 of fixed liens on its properties, not including interest in default, which has been carried into this decree of foreclosure. It had in June, 1915, a floating indebtedness of over $2,000,000.00; at the present time probably $3,000,000.00. The Railroad Commission valuation of the property was $32,000,000.00 approximately, to which we will assume that the Commission would add additions, not valued by it, of about $2,000,000.00 more if requested. The experience of these properties for seven years is that they earned net, very close, on an average, to 3½ per cent on $32,000,000.00. The Railway has $4,822,000.00 par in outstanding stock subject to all of the claims mentioned. The Road is in the hands of Receivers and a decree of foreclosure has been entered, but the date of sale not set. What, in your opinion, would be or was the value in June, 1915, and at the present time, of the stock of the Railway, if any?" The
263 witness answered: "My opinion would be it is absolutely worthless, measured by my experience with stocks of that kind and every other stock." He said that this is so on account of the great encumbrance ahead of it. The witness was asked to consider any property as a great industrial enterprise,—not meaning a bank—and to take an experience over a number of years, and to assume that the property cost $40,000,000.00, and that it makes here in Texas an income on $30,000,000.00; that you cannot get the property away, that it is fixed, tied up as a physical entity, like a great railroad, and we will suppose that it makes 5% on $30,000,000.00 though it cost $40,000,000, 5 per cent. on $30,000,000.00 for seven years. The witness was asked: "Would that property be worth $30,000,000.00 or $40,000,000.00?" Answer: "It would be worth $30,000,000.00 and not $40,000,000.00, and in Texas it would not sell even at $30,000,000.00, because, in Texas it would require a larger dividend on that sort of industrial concern than 5%; that one could not find an industrial concern in Texas that would sell at par on a 5% basis, generally speaking—there might be exceptions, but that it can be safely stated that an industrial concern will not sell

at par bearing only 5% dividends; that this was so because the rates of interest are rather high in Texas; that a rate of 7% is not considered high in Texas; that he borrows money frequently at 4% and 4½% in New York, when he would have to pay 7% in Houston; that he kept two bank accounts.

That he never got a market quotation of the stock of the I. & G. N. Railway; that he goes over these stocks almost daily and deals with them here in Texas to a considerable extent, that is, system stocks, such as the Pennsylvania, the Atkinson, or the Canadia Pacific, and that he did not know of the offer of any segregated Texas railroad stocks.

The witness was then shown Sherwood & King's monthly report stock quotations of March 1st, 1916, containing bank stocks. It was stated by Counsel for the Plaintiffs that he desired to prove this up now for future use, and to avoid recalling Mr. Sherwood. He was asked whether or not the quotations in the identified pamphlet
264 and circulars of local bank stocks, but generally all of the quotations therein reflected the average market, but said that they did; that they were gotten out a few days ago, based on actual transactions.

Cross-examination by defendants:

The witness was asked to state to whom the excess would belong if the I. & G. N. Ry. were worth $40,000,000.00 and had a lien indebtedness of $2,000,000. He answered the excess would belong to the stockholders. Upon objections being made that this was not according to the facts and sustained by the court, counsel said that it made no difference to say that there was $29,000,000.00 indebtedness, would not the excess belong to the stockholders? The witness answered, it would in any ordinary corporation; and he presumed so in the case of a railroad. He was then asked that "if that were true, would you say that the stock evidencing the interest of the stockholders would be worthless?" The witness answered: "Not under that condition," for in the way the question was put the stockholders would have $11,000,000.00 worth of assets, and further that if there were only $4,822,000.00 stock outstanding it would be worth a premium of $7,000,000.00 under the conditions stated.

The witness said that he had no offer to handle the I. & G. N. stock; that he did not recollect as to the bonds and had never heard of I. & G. N. stock selling in Texas; that in Texas railroad stocks were bought only as a rule, under the systems that their business was rather large and that he recalled no sale of separated Texas railroad stocks. The witness said that he would not say that he did not know the reason why Texas separated railroad stocks were not sold in Texas, but guessed that he did, but he could only give his views about it, but that he had not been a profound individual student of that matter; that he knew in a general way, why these separated stocks were not sold in Texas. He was then asked; that if the owners of this stock should consider it of enough value to organize a
265 corporation under the laws of another state and to issue some sort of a certificate apparently intending to represent an ex-

cess of value, or a premium on stock, whether or not that would be an indication, according to the witness's observation and experience, that the stock was worth more than the previous value. The witness answered: "If they were honest men it certainly would." He was asked: "Then, if they have, in fact, issued a certificate in addition to the stock of the previous value, of $5,000,000 and some hundred thousand dollars, according to your observation and experience in the stock and bond barket, that would evidence their judgment that the stock really had a premium of at least that much, wouldn't it?" Answer. "Yes sir." He was then asked that, if they had actually issued $12,125,000 of bonds held in their treasury, technically speaking, at face value, and that they were able to go into the market and borrow $11,000,000 at 5% on the security of this $12,000,000 of bonds that they had passed, would not you regard these bonds as of some value, and the witness answered that he would, but that he would not necessarily regard the property as having an excess of value over this stock now; that that did not necessarily follow, that the bond issue was the underlying mortgage. It was then stated to the witness that the second issue of bonds under the second mortgage (now foreclosed) had been deposited as collateral, on which there had been borrowed $11,000,00-, that is, the $11,000,000 had been borrowed on second mortgage bonds as collateral. The witness answered that that would indicate that it was reasonable to suppose that the collateral deposited bonds had some value in excess of the amount borrowed on them, and that this excess would be of value over the prior liens, and that the ordinary terms on railroad bonds and stocks varied a great deal.

Redirect examination:

The witness was asked in regard to the monthly stock quotations made by Wm. B. King & Company of February 1st, 1915, and stated it was made by him personally, and that it was correct and that was the pamphlet issued by him. It was stated by counsel for
266 plaintiffs that he was proving up this pamphlet for future use. The witness stated that there would not be much variation between prices as stated on January 1st, 1915, and to February 1st, 1915, except that matters were commencing to improve a little; that the variation would be very little; that he had no January pamphlet; that at that time, on account of the European War his firm did not make a mont-ly issue of their quotations.

(11) W. J. Werner was recalled by the defendants and cross-examined by them. He stated that the I. & G. N. Ry., or its Receivers, did not keep any inventory of the property showing valuation, from their standpoint, except the books in his office, which showed the book value, and that he had on file the various Railroad Commission orders showing the values as they recorded, and that he thought that the Engineering Department, perhaps, had all the blue prints pertaining to the different properties owned. That his book entries did not segregate the property by counties, or as to Harris County, and that he had in his possession no records of the

replacement value of the property, and that these records, if any, would be in the possession of the Engineering Department, who were working on them,—he could not say that they were completed.

Referring to tables made by the witness, the witness stated that book cost of properties as of June 30th, 1914, were entered as $43,818,430.79, to which there should be some additions made since June 30th, 1914, of which he did not have the figure, but which he could obtain.

The defendants here introduced in evidence a table, of which the following is a true copy. Before this document was introduced, Counsel for the plaintiffs stated: "That shows the amount of money, according to the books, during the whole history of the Company, was invested in tangibles," and that he did not see what bearing it had upon the intangibles, but had no objection to its introduction:

(Here follows table showing total cost of road and equipment, etc., marked page 267.)

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY

Jas. A. Baker & Cecil A. Lyon, Receivers

Total Cost Road and Equipment, including Additions and Betterments, included in Operating Expenses and Charged direct to Income - Amount Per Mile of Road - Per Cent of Net Income to same

June 30th	Miles of Road Owned	Net Income Available for Interest Dividends, A & B Etc.	Book Costs of Properties	A&B Included in Op. Expenses or Chgd. to Income-Less 15% for Deprn., Etc.	Total Cost C&E and A&B Chgd. Income Direct or included in Oprg. Expenses	Total Cost C & E & A&B Chgd. Income or included in Oprg. Exp. Per Mi. Rd. Ond.	Net Income to Tot. Cost C&E&A&B Chgd in come or incl'ed in Op. Exp	Valuation Railroad Commission of Texas	Valuation Per Mile of Road	Per Ct Of Net Income to RR Com. Valuation
1890	775.4	727,680.18	$28,525,269.97	$ 993,600.48	$29,518,870.45	$38,069.13	2.47			
1891	775.4	301,415.80	28,550,747.82	1,330,088.40	29,880,836.22	38,536.03	1.01			
1892	775.4	457,643.39	28,651,919.58	1,565,940.24	30,217,859.82	38,970.67	1.51			
1893	775.4	1,301,631.40	28,753,016.63	1,664,763.36	30,417,779.99	39,228.50	4.28			
1894	775.4	451,066.69	28,671,729.03	1,738,852.33	30,410,582.36	39,219.22	1.36			
1895	775.4	1,057,360.01	28,669,149.03	1,818,845.19	30,487,994.22	39,319.05	3.46			
1896	775.4	659,848.71	28,669,149.03	1,944,045.38	30,613,194.41	39,480.52	2.16			
1897	775.4	748,438.25	28,909,149.03	2,097,176.40	31,006,325.43	39,987.52	2.41			
1898	775.4	1,076,335.90	28,909,149.03	2,230,718.05	31,139,867.08	40,159.75	3.46			
1899	775.4	1,114,033.99	28,909,149.03	2,508,391.22	31,417,540.25	40,517.85	3.55			
1900	775.4	1,144,174.39	28,909,149.03	2,828,020.02	31,737,169.05	40,930.06	3.61			
1901	837.4	1,287,970.39	31,307,107.95	3,252,705.67	34,559,813.62	41,270.38	3.73			
1902	956.62	1,154,412.82	34,855,202.17	3,577,266.01	38,432,468.18	40,175.27	3.00			
1903	1,051.1	1,201,822.41	38,322,895.39	4,016,268.62	42,339,164.01	40,280.81	2.84			
1904	1,106.0	1,186,630.66	39,061,709.54	4,208,387.92	43,270,097.46	39,123.05	2.74			
1905	1,106.0	1,235,393.87	39,215,828.45	4,435,732.86	43,651,561.31	39,467.91	2.83			
1906	1,106.0	645,823.61	39,440,015.17	5,109,868.88	44,549,884.05	40,280.18	1.45			
1907	1,106.0	1,930,030.98	39,677,066.08	5,304,469.20	44,981,535.28	40,670.47	4.29			
1908	1,106.0	-395,437.98	39,667,499.81	5,327,844.24	44,995,343.05	40,682.95	-0.88			
1909	1,106.0	782,508.43	39,667,499.81	5,333,333.94	45,000,833.75	40,687.91	1.74			
1910	1,106.0	971,160.91	40,750,322.10	5,333,333.94	46,083,651.04	41,666.96	2.11			
1911	1,106.0	1,234,897.45	40,924,915.78	5,333,333.94	46,258,249.72	41,824.82	2.66			
1912	1,106.0	2,203,793.36	41,168,707.61	5,333,333.94	46,502,041.55	42,045.25	4.74	30,365,047.97	27,418.72	7.27
1913	1,106.0	1,668,236.40	42,403,002.85	5,333,333.94	47,736,336.79	43,161.24	3.49	32,181,635.00	29,097.32	5.18
1914	1,106.0	878,327.60	43,818,430.79	5,333,333.94	49,151,764.73	44,441.02	1.79	32,181,635.00	29,097.32	2.78
1911-2	2½ Mos. Jul. to Sep. 15	264,897.56	40,924,518.12	5,333,333.94	46,257,852.06	41,824.46	0.57			.89
*	9½ Mo. 9-15 to June 30	1,938,695.80	41,168,707.61	5,333,333.94	46,502,041.55	42,045.25	4.17	30,365,047.96	27,418.72	6.38

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268 The witness stated that he did not have the information with him as to the book value of the rolling stock; that as reflected on the Company's books it was an estimate in some respects; that when the properties were reorganized in 1911, having been sold out, they were purchased at a lump sum, so to speak, and in accordance with the requirement of the Interstate Commerce Commission, the value of the equipment appraised. The witness said that he could get this from his books, if desired, and was requested to furnish it of the last day for which it appears.

That there was considerable rolling stock not valued by the Railroad Commission, a statement of which had been introduced, and that items $950,000.00 and $4,900.00 and $14,100.00 had not been yet valued by the Railroad Commission, which valuations had taken the rolling stock in with the other properties, as far as valued; that it could be segregated with a good deal of work; that the sum of $596,273.85 valuation allowed by the Commission of rolling stock October 31st, 1915, was included in the $32,000,000.00.

Witness stated that he did not know how the valuation of the rolling stock reported to the State Tax Board compared with his book valuation of it. He did not know whether it was more or less; that the reports to the Railroad Commission were made under his direction; that in the report of June 30th, 1914, it was shown that the total mortgage bonds issued were $26,307,000.00; that on his books both the $11,000,000.00 in notes were issued and the $13,750,000.00 pledged as security therefor in bonds were carried, but that the double entry of $11,000,000.00 was offset by a miscellaneous entry on the other side.

Counsel then stated that he desired to offer in evidence the $11,000,000.00 in notes, and he contended that the Federal Court, in foreclosure, treated the $11,000,000.00 in notes and the $13,000,000.00 pledged to secure them were independent transactions. To this contention the plaintiffs objected that it was erroneous, the decree being in evidence. The court stated that he understood

269 that the second mortgage bonds were put up as collateral for the $11,000,000.00, and that the bonds and the notes securing them could not be added together. Counsel for the Defendants stated that he was not offering the notes absolutely for that purpose, but in order to show that there was a contest going on as to who should have these collateral bonds. The court stated that the notes would be admitted, but the very notes were not introduced in evidence, it being uncontested that they were for $11,000,000.00 as set forth in the decree of foreclosure, which had been introduced. Counsel for plaintiffs then stated that there were $1,600,000, in round figures in issued bonds outstanding as shown in the decree of foreclosure, and foreclosed therein not pledged to secure the notes.

Counsel for defendants then offered a trust agreement, under which the notes were executed, the substance of which was as follows. This was an agreement dated August, 1911, executed between the I. & G. N. Railway and the Central Trust Company of New York, a corporation, and recited that the Railway Company, by proper resolutions of its stockholders and bondholders, had determined to

execute its notes for the aggregate of $11,000,000.00 known as its three year 5 per cent notes, each of the denomination of $1,000 payable August 1st, 1911, interest at 5%, payable semi-annually on February 1st and August 1st of each year. Then this trust agreement set out the forms of the notes substantially as stated above, to which were attached interest coupons of $25.00 each representing 5%, payable semi-annually. It was then stated that the Railway Company had determined to secure said notes by a pledge under the trust agreement, the pledge to be made to the Central Trust Company, as trustee. It was then stated that the Railway Company had pledged $12,150,000.00 face amount of its bonds under its refunding mortgage, and also had transferred $1,600,000.00 of these bonds to the Central Trust Company, this last amount being termed the exchangeable pledge bonds. That the pledges of these two sets of bonds were made in trust notes to be registered, if required, by the Railway; that the Railway could redeem these notes at par
270 at any time with a premium of one per cent, and could procure the release from the lien of the trust agreement of the non-exchangeable pledge bonds, to-wit: $12,150,000.00 in amount by paying to the Trustee $915.00 on each bond of $1,000.00; that the Trustee could not collect interest on the bonds as long as the interest on the notes was paid, and that no coupon should be severed or separately pledged; that in case of default, or in case of appointment of a receiver the Trustee could declare the notes due. The Trustee was given the power of sale and rights to foreclose, and to sue on the notes and bonds in case of default on the notes.

As to the exchangeable pledged bonds of $1,600,000.00 in amount it was provided that the Railway Company might become entitled to have them delivered free of pledge in exchange dollar for dollar for the preferred stock of the Railway Company; whereupon the Railway Company was to deliver its preferred stock for the same amount to the Trustee to be subject to the pledge.

It was provided that the bonds were to be cancelled when substituted by preferred stock.

Cross-examination of the Witness Then Proceeded.

The witness stated that the interim certificates appeared in the statement in the deferred credit items, that is, in the statement of the figures introduced. This means a liability. The face amount of the interim certificates was $5,078,000.00. The item appears somewhat larger as containing other elements. Interim certificates are carried as stock is carried, and if added to preferred and common stock, would make the sum of $9,800,000.00. The authorized capital stock under the charter is $11,000,000.00, and under the plans of the Company common stock is reserved to be exchanged for the interim certificates, as the Railroad Commission may increase its valuation to that extent. The $1,600,000.00 of stock referred to above is exchangeable for preferred stock, and it added to the interim certificates and other stock, would make the amount of $11,000,-

INTERNATIONAL & GREAT NORTHERN RAILWAY
Jas. A. Baker and Cecil A. Lyon, Receivers

Statement showing Book Value of Rolling Stock as of January 31 1916

	Book Value July 1 1915	Investment since Jul. 1 1915	Abandoned since Jul 1 1915	Depreciation to Jan.31 1916	Net Book Value Jan. 31 1916
Locomotive Equipment, - - - - -	1,805,887.35	5,954.30	10,008.55	161,799.92	1,640,033.18
Passenger Train Car Equipment,-	535,511.42	Cr 30.81		47,342.00	488,138.61
Freight Train Car Equipment, -	2,396,840.08	3,821.57	54,576.74	217,954.29	2,128,130.62
Work Train Car Equipment, - - -	109,654.82	6,412.12	1,146.21	11,397.26	103,523.47
	$4,847,893.67	$16,157.18	$65,731.50	438,493.47	$4,359,825.88

Page 272.

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Auditor's Office,
Houston, March 8 1916.

000.00, but the Company has not been capitalized up to that amount, according to the witness's books.

It was here interjected by counsel for plaintiffs that
271 $1,600,000.00 on the supposition stated would have to be deducted from the bonded capitalization. The witness stated that he did not know who held the interim certificates, except that he thought that he had been advised by the Treasurer that they were held by the Virginia Corporation, called the I. & G. N. Railroad Corporation of Virginia; that he did know who held the common stock.

The court adjourned, and at the nect meeting the cross-examination of Mr. Werner was continued, who stated that he had obtained a statement of the book value of the rolling stock as of January 31st, 1916, and statement of charges and additions and betterments from July 1st, 1914, to January 31st, 1916, as requested by counsel for the defendants. The defendants then offered this statement in evidence, which is as follows:

(Here follows reproduction of table showing book value of rolling-stock, etc., marked page 272.)

273 The witness stated that the depreciation was at the rate of 3 per cent on locomotives and passenger cars per annum, and 4% on working cars on the book cost of the equipment, and that the value as of July 1st, 1915, would not vary greatly from the figures for December 1st, 1914, except, of course, the depreciation should be entered subject to which the figures in the first column would represent the net book valuation as of that date, and the witness stated that the rolling stock was valued for taxation in report to the State Intangible Tax Board, recently filed of date February 21st, 1916, at $2,168,906.00 or roughly, close to 50% of the figures in the table; that the figures in the table, however, did not represent the real value of the equipment, but the book value; that he had made no personal inspection and attended to the bookkeeping end alone, and would only, in a general way, have a knowledge of the real value; that he had in mind the last report from the Mechanical Department about cars awaiting repairs—some 300 odd box cars awaiting heavy repairs indicating expenditure of $150.00 to $200.00 per car in order to bring the cars up to the value represented by the book value, and that the depreciation by percentages only take care of the instances where cars are condemned and written out of the account, that is abandoned. That so much depreciation is shown, and at a certain date it is abandoned and that the depreciation is insufficient to take care of the balance, which is marked off as abandoned property. Cars destroyed by fire, the entry would be to write the value of the car out of the equipment account and as an offset would be to charge the Insurance Company with the value to the extent of the insurance, and so, when a car is destroyed on a foreign line, the bill would be made out against it; when destroyed on our line the value of the car would be written out of the column and charged pro rata to the accrued depreciation. Repairs belong to operating expenses. When new equipment is bought it is charged to property investment and the Treasurer is credited with the amount of cash paid out, it is simply a transfer from the cash to the property investment.

274 Operating expense is not charged twice. When a car is destroyed, that portion of it not representing salvage will be charged to operating expense. Take a car bought last year and paid for from income, or operating revenues, which would be income. Then the Treasurer would pay for the car out of cash and the value of the car would be transferred from the Treasurer's cash to the property investment, and operation would not be affected by the purchase, because cash is considered an investment in property, and if cash is converted into a box car, you simply transfer that much from cash investment to property investment. Now, this car is destroyed and if we have no insurance protection, it becomes necessary to relieve the property investment of the whole value and charge it to operation, less salvage.

The defendants nect offered in evidence table made by Mr. Werner showing statement of charges to additions and betterments from July 14th to January 31st, 1916. It was admitted in evidence to cover

the figures up to January 1st, 1915, the court ruling that the balance were irrelevant, and that portion admitted was as follows:

"International & Great Northern Railway.

Jas. A. Baker and Cecil A. Lyon, Receivers.

Statement of Charges to Additions and Betterments from July 1st, 1914, to Jan. 31, 1916, inc.

July 1914	$6,130.40
Aug. 1914	21,237.12
Sep. 1914	43,915.57
Oct. 1914	67,724.93
Nov. 1914	24,006.98
Dec. 1914	1,511.26
	$164,526.26"

The witness Werner was examined on re-direct by the plaintiffs and testified as follows: That there would be no material difference between the figures given by him for book value of equipment on July 1st, 1915, and those on January 1st, 1915, except that there might have been additions and betterments to the extent of $100,000.00. It would not make a difference of over $100,000.00 one way or -other; that if the depreciation had been written to January 1st, 1915, there would be that much less depreciation. Repairs come out of the operating expense. The *The* depreciation figures
275 is 3% to 4%, which is not a standard over the United States. The depreciation rates vary on various Roads, according to the length, life and character of the equipment. On a badly equipped or muddy roadbed the rate would be higher.

Recurring to Mr. Maury's testimony, the table covering 1901 to 1914 inclusive showing the experience of the properties, the witness stated that Mr. Maury's sheet had been refigured and investigation made to determine whether or not betterments in whole or in part, prior to 1907 were charged to Income, and that Mr. Maury's figures were gone over so as not to charge any betterments to operating income, but to figure them up. The witness stated that Mr. Maury's sheet set out above showing the per cent of the income to the Commission valuation as a fourteen year average of 4.251. Deducting the additions and betterments charged from operating expense that figure changes to 4.636% for the same period. As set out above, it was stated that Mr. Maury's table was subject to this correction.

The table was next introduced in evidence, being as follows:

276 International & Great Northern Railway Company.

Accounting Department.

Net Income Available for Interest, Dividends, Additions, and Betterments, etc., and Its Per Cent to Railroad Commission of Texas Valuations Allowed to June 30, 1914, Allotted Back to the Year in Which the Expenditure was Taken up on Int. & Grt. Nor. R. R. Books.

	Net income available for interest, etc.	R. R. Com. valuation to June 30, 1914, apportioned to the years in which the investment was taken up on I. & G. N. books.	Per cent of net income to Commission valuation.
1901	1,287,970.39	17,319,036.60	7.44
1902	1,154,412.82	20,951,880.78	5.51
1903	1,201,822.41	24,518,304.19	4.90
1904	1,186,630.66	25,349,632.25	4.74
1905	1,235,393.87	25,626,245.69	4.82
1906	645,823.61	25,880,407.45	2.50
1907	1,930,030.98	27,466,802.43	7.03
1908	Cr395,437.98	27,744,031.97	....
1909	782,508.43	28,154,119.19	2.78
1910	971,160.91	28,537,845.12	3.40
1911	1,234,897.45	29,202,502.99	4.23
1912	2,203,593.36	30,921,279.29	7.13
1913	1,668,286.40	32,181,635.00	5.18
1914	878,327.60	32,181,635.00	2.73
10 Year Average	$1,115,453.46	$28,789,650.41	3.87
14 Year Average (1901-1914)	$1,141,812.21	$26,859,668.42	4.251
1st 7 Year Average	1,234,587.82	23,873,187.06	5.171
2nd 7 Year Average	1,049,040.88	29,846,149.79	3.515
14 yr. tot. as above	15,985,341.01	375,757,357.95	4.254
Add Betterments including exp. 1901 to 1907, inc.	1,436,796.78	.....	.....
Total Including Betterments	$17,422,137.79	$375,757,357.95	4.636

Houston, Texas, July 19, 1915.

Average per year for 14 years	$1,244,438.41	26,839,811.28	4.636

Cr. indicates deficit.

277 It was here pointed out that it appeared by the evidence already introduced that the Railroad Commission valuation last summed up by it was $32,181,000.00 odd, and that unvalued additions would bring the figures up to something over $34,000,000 as of December 31st, 1914; whereas the calculation was made on a lower railroad Commission valuation.

The witness Werner was re-crossed by the defendants and stated that Mr. Maury's calculation had been refigured to cut out the charge to expense of additions and betterments, which had been charged in expense from 1901 down to through 1907, which was the last year that they were so charged.

(12) H. Booth, called by plaintiffs, testified that he is by profession a railroad man of the Traffic Department, and has been with the I. & G. N. Railway properties about thirty-five years as Local Agent, Traveling Freight Agent, Commercial Agent, General Agent, General Freight Agent and General Traffic Manager, which last he now is, as the head of the passenger and freight departments, or in other words, of the whole traffic department; that he had gone through the whole business in his department, including that of telegraph operator; that he became general freight agent in 1911, since which time he has had a general intimate view of the workings of the whole problem, and before that time as Assistant General Freight Agent for ten or fifteen years—had more or less knowledge of the general affairs of the Traffic Department. The traffic department is a sales department and *and* selling transportation is the only thing a railroad has to sell, and which it is created to sell, and if it sells anything else, like an industry site along its right of way, but that sort of thing is mainly done to get people along the line as a source of traffic. The railroad must be worked to sell transportation, and to do that you must have a first class railroad, equal to competitors, able to serve the public as expeditiously and satisfactorily as competitors—otherwise it cannot be operated successfully, the rates at competitive points being the same everywhere, fixed within the State by the
278 Railroad Commission, and between interstate points, filed with the Interstate Commerce Commission, and necessarily all railroads file the same rates, and they are adjusted, explained, cut down or elevated by the Interstate Commerce Commission, so there is no competition of rates between railroads, but a competition of service, and it is absolutely necessary to compete with service. The I. & G. N. operates 1,106 miles of trackage in Texas.

The plaintiffs here introduced in evidence a map, being the Railroad Commission Map of the State of Texas, and showing the lines of the I. & G. N. and other railroads, and it was stated in evidence that while there were 1,106 miles of owned lines, there were 53 other miles over which there was operation, 48 3/10 being the G. H. & H. between Galveston and Houston, of which the I. & G. N. was one of the tenants, and the difference between 48 3/10 and 53 was made up by a few terminal operations on which there was a lease of such privilege, mainly at Waco.

The Railroad Commission map was then introduced and is "Ex-

hibit (1)" in roll of identified maps, and made a part hereof.

The witness stated that the following were the chief competitive points along the I. & G. N. Railway, to-wit: Galveston and Houston, and points intermediate between, and Conroe, Trinity, Palestine, Jacksonville, Tyler, Mineola, Longview, Henderson, Jewett, Hearne, Rockdale, Taylor, Georgetown, Austin, San Marcos, Avondale, Laredo Stoneham, Navasota, College, Bryan, Calvert, Marlin, Waco, Mertens, Italy, Venus, Fort Worth.

That the I. & G. N. Ry. is crossed in many directions and has strong competitors in nearly every foot of its territory, and some of the territory is crossed by competing railroads *is* in adjacent territory, and the adjacent teritory is competitive with some other railroad closely located, and that the Sunset-Central lines, M. K. & T. and Santa Fe are perhaps its -trongest competitors.

Over the objections and exceptions of the defendants the witness testified that the Sunset-Central lines, the M. K. & T. and the
279 Santa Fe were in very much better physical condition than the I. & G. N., particularly the Santa Fe and the Sunset-Central Lines. Practically all their main lines are ballasted and laid with heavy steel, while the I. & G. N. is, to a large extent, a dirt road and not ballasted, the operation of which is difficult during bad weather. Bad weather affects the traffic and the revenue, including high water, washouts and floods, very seriously. In 1913 there was a destructive flood in the Brazos bottoms where the I. & G. N. occupies a very exposed position with reference to the river, which went over the tracks perhaps 70 miles and put the road out of business in that territory for perhaps three weeks. In 1914 there was another flood in the Brazos and the Trinity and the road was washed out between Palestine and Longview, and Houston and Palestine, and perhaps a dozen places between Valley Junction and San Antonio. The road can be very much improved and the witness said that he knew of his own knowledge why it was not improved. He is one of the railroad executives. Objections were made to his stating, but over exceptions overruled, the witness stated that the road was not improved for the lack of money and credit; that income was the basis of railroad credit, that is, net income. The Fort Worth Division was built in 1903, 1905 or 1906. Since that time there has been no substantial addition. There have been three receiverships since the witness was connected with the properties—the Bonner and Eddy took place about 1889. Net operating income is the basis of a railroad's credit,—the principal commodities of the I. & G. N. Ry. freight are cotton, lignite, stone, sand, gravel and lumber, and the larger part of its tonnage is of low rate, bulk commodities, with a preponderance of tonnage south bound, and about 60% of cars empties when North bound. A balanced, ideal movement of freight is equal tonnage in both directions, so that revenue is accruing whenever the wheels are moving. The unbalanced condition of the I. & G. N. is largely due to the movement of empties out of Galveston, and this is the experience of the properties. Galveston being dominantly exporting rather than importing, although a good deal of

freight comes into Galveston coastwise, in which the I. & G.
280 N. gets a portion for the interior, but nothing like the out-
bound in tonnage, as a large movement of cotton and export grain to Galveston and Texas City creates a very heavy movement of empties North bound.

The I. & G. N. is not "milked" by out-state connections or divisions on traffic, but gets a better revenue out of its division of interstate traffic than it does on traffic exchange, which is intra-state in Texas, that is, a better revenue on interstate divisions than on Texas Railroad Commission locals. It is in a position to command a favorable division because of its numerous connections and ability to pit one against the other. Mail revenues are very unremunerative, that some effort is being made to better them without any success so far.

As to express, the road gets 50% of the gross express revenue, and a proportionate division of the same when hauled over several lines. When the United States Government went into the postal package express they took it out of the express car and put it into the mail car and called it mail and made the railroads haul it under the mail contract, paying extra therefor only a very small amount in some cases, which amounted to very little. They did this by making the change after they made the four years weighing of the mail on which compensation was based, and made the road haul it for nearly nothing. This was the effect of the Parcel Post. The Government pays nothing for delivery from the depot to the Postoffice and although the postal express is run by the Government as a deficit, made up out of taxes—it is largely run by the railroads for nothing, as far as the hauling is concerned.

The course of rates on the I. & G. N. have always been down. In 1899 the Texas Commission reduced the rate on cotton 5¢ per 100 pounds—in 1910 4¢ per 100 pounds, that is, the rate to Galveston from common point territory, from 60¢ to 51¢; common point territory is all of Texas 160 miles away from Houston. Then there was a differential into Galveston. The total reduction from common point territory into Galveston within the last fifteen years on cotton
has been 9¢ and inside of 160 miles it is on a mileage basis.
281 The common point territory was reached about Waco and in-
cluded the vast volume of cotton. The course of rates on other heavy commodities as grain, lignite, coal, lumber, stone and gravel *have* been downward. On stone, sand and gravel reduced in 1913 to 17¢. The rates on lumber and lignite have been fairly steady, but on lignite are very low, approximately ½¢ per ton per mile, which is barely the cost of service without allowing for capital charge. These rates have largely resulted under pressure from the cry to develop the country and to help build roads and other enterprises, particualrly on stone, sand, gravel and road material;—somewhat like the tariff on infant industries, only the railroads pay the tariff and when the infants grow up they never advocate raising the rates, and the cry is still "put them down."

It is particularly true of railroads as of all life, that you have to grow, die or stagnate. A railroad cannot reach a period where it can stand still, keeping everything as it is. It has to grow or die. The

I. & G. N. has not been growing for the last ten years, since the Fort Worth Division was built. It has been encroached upon by competing railroads. The T. & B. V. cut into the Ft. Worth business derived from the Ft. Worth & Denver and Rock Island, which practically owned it, and diverted their tonnage to it, which made quite serious inroads into the I. & G. N. revenues. In 1910 or 1911 the M. K. & T. purchased the Texas Central, a valuable feeder of the I. & G. N. at Waco, probably giving it 100,000 bales of cotton per annum. This was all diverted to the M. K. & T. which road also acquired the Wichita Falls & Northwestern, a very valuable connection of the I. & G. N. and giving it formerly a great deal of tonnage, which was all diverted. A little later the M. K. & T. acquired the Beaumont & Great Northern from Trinity to Livingston, and deprived the I. & G. N. of long haul of tonnage on that line. Later the M. K. & T. acquired the Houston & Brazos Valley from Anchor to Freeport, and deprived the I. & G. N. of a long haul on its tonnage. The construction of the Gulf Coast Lines opened up a new route to Mexico in competition with the Laredo route, and the Sunset-
282 Central Lines have recently constructed the Giddings cut-off, connecting from Hearne to Giddings and Flatonia down to San Antonio, depriving the I. & G. N. of considerable tonnage, particularly livestock. During this period the I. & G. N. has not had extentions of its traffic connections, except the M. O. & G. at Fort Worth, which did not result in any movements of tonnage. The San Antonio Uvalde & Gulf serves competitive territory with the I. & G. N. It is a feeder of the I. & G. N., but draws considerable business from it in competitive territory. Longview, Ft. Worth, Tyler, Mineola, Galveston, Texas City, Laredo and Waco are the chief I. & G. N. gateways. Before the war broke out in Mexico earnings on Mexico traffic of the I. & G. N. were about $1,000,000.00 a year, and for three or four years it has been practically nothing, due to the revolutionary conditions which are, as far as freight traffic goes, unsettled. The connection with the old National Lines of the I. & G. N. is very bad, the property is destroyed to a large extent and the Mexico lines without equipment and motive power and facilities for interchange of business. There has been some movement of ore, but the general business in and out of Mexico is very small. Mexico has been largely ruined by the vast destruction of capital, the means of making a living and buying transportation with the vast loss of confidence.

The general effect upon operating revenues of the various matters testified to has been to reduce them. The witness testified as a long experienced railroad man; that leaving out of view losses due to lack of money and capital and inability to put the road into proper operating condition, which would be the most economical, that his judgment was that it had been well managed. When we had washouts and bad operating conditions the business went to competitors; that he estimated roughly that in 1913 the loss of business by bad weather conditions amounted to something like $250,000.00, this without including repairs; that with the growth of the country there has been a general increase of gross income, with a period between 1911 and

1913 of somewhat favorable conditions whereby a better showing was probably then made than would ordinarily be the case, partly due to the unfavorable conditions of competitors and their labor
283 troubles and so on, and strikes—we have had no strikes, but 1912 was the banner year in the history of the properties. The tendency has been to lower rates with more privileges, without additional compensation, particularly reference is made to the order of the Railroad Commission about two years ago, requiring the absorption at junction points of switching charges to industries, costing the I. & G. N. annually about $50,000.00 without corresponding advantages. Other privileges loaded on are milling in transit, absorption of loading charges, the burden on cotton rates of compression is 10% per 100 pounds, which has been of long standing. In addition there are loaded on switching privileges, depreciation privileges and reconsignment privileges.

Cross-examination by defendants:

Loading charges are not absorbed at this particular time. A second concentration of cotton is allowed at the additional charge of 3¢ per 100 pounds, though the regulation prescribes that it shall not cost anything. Before Government regulation the witness did not think that the privileges spoken of were voluntarily granted by the railroads as have been required of them by the Railroad Commission. They did extend privileges of all sorts as a means of getting business, and to a great extent, but under government supervision, rates on railroads are getting less than before, and not as much earning per ton mile. Terminal facilities are absolutely essential to do the physical handling, and also as a competitive factor. The arrangement into Galveston over the G. H. & H. from Houston is a trackage arrangement. The witness did not known how valuable it was. If there were no other line into Galveston it would be very valuable, but there are a number which would be glad to handle the business. The I. & G. N. has to get into Galveston. It is some advantage to the whole railroad, in the solicitation of business, to be able to handle business by the I. & G. N. itself into Galveston, but very questionable whether it would not pay the I. &. G. N. to turn over its business here in Houston to some other railroad and let them complete the haul into Galveston, and pay the expense down there. That the 40
284 years' contract running from 1895 which the properties have with the G. H. & H. do not place the I. & G. N. in a position to demand a better division or better terms for the handling of its freight than it could get, if it turned it over to the Santa Fe. This was not at all the case. There were standard railroad divisions between Houston and Galveston by which any line between those points would handle the I. & G. N. business in cotton for 6¢ per 100 pounds. It was questionable that the I. & G. N. could make anything at that rate, but some advantage in the solicitation of business to handle your own business—whatever value there was in it spread out over the whole railway.

There are valuable terminals in Houston, consisting of the old

Houston Oak Lawn & Magnolia Park, which, however, gave no monopoly on the South side of the bayou. All the business there was open to solicitation. Below Houston, on the beayou, the I. & G. N. owned about a mile of water front. The witness did not think that the I. & G. N. owned more land down on the bayou than the Sunset-Central which owned a lot of property at Clinton, about three miles below the Turning Basin on the North side.

The general volume of traffic in the entire State, the witness thought, had increased since 1911 to a considerable extent, but in 1914 was probably not so heavy, and 1915 was a decrease, notwithstanding the loss on Mexico business, floods and acquisition of feeders by competitors, gross income had held up on account of the growth of the country and increase in the production of cotton, but in 1914 was less than in 1911, and there has been on this comparison a very considerable decrease, and so, for the fiscal year ending June 30th, 1915. 1914 would compare favorably with 1910 or 1911, but very short of 1913 or 1912. 1914 compares favorably as to a gross income with years previous to 1911, but shows no material increase. Some railroads have increased. The M. K. & T. for instance, and the Santa Fe. To what extent the witness could not state. He thought that the European war had adversely affected conditions.

285 Whenever the war closed in Mexico witness could not say what the effect would be, but that it would take many, many years for the conditions to be restored, as the Mexicans would have to have the money to pay for reconstruction. The I. & G. N. the witness thought, reached the largest gateway on the border of Mexico, and had the shortest route to Mexico City, but there was not very much difference as compared with Eagle Pass and Brownsville

There was a good deal of business done at Waco, getting into Waco over the Cotton Belt for a short distance, but the I. & G. N. could het in over other railroads. The Cotton Belt is a strong competitor with the I. & G. N.

Between San Marcos and Austin the I. & G. N. had the M. K. & T. for its tenant, which helped to pay for maintenance, but was a losing proposition. Cotton is considered attractive tonnage, and the I. & G. N. is a great cotton carrier. It gives the road 21% to 22% of its total revenue, but witness thought general merchandise is the best earning commodity. To St. Louis for freight and from Houston, the I. & G. N. via Longview and Iron Mountain, is about the same as the route via Shreveport, but the I. & G. N. to St. Louis with its connections and passenger traffic, has about 180 miles advantage over any competitor, and gave on the fast train about eight hours shorter time.

The earnings on mail carriage all less than first class freight, and not compensatory, in view of the service. The railroads, in carrying mail, furnish no clerks, but handle the mail at stations at small places. The railroad has to furnish the mail cars for whatever the volume demands, and to deliver the mail to the postoffices at all stations, except in the cities.

For the express the railroad furnishes ordinary express cars, except that the Express Companies furnish some special equipment of their

own, as refrigerator cars. The express rates are higher, but the railroad and express men are usually joint men, as baggage men and express men, but the express company pays for its handling.

The witness thought the express revenues to the railroad were better than the mail, but did not in comparison with freight and
286 and other passenger service.

The bad weather conditions testified to were confronted to some extent by other railroads in the same territory, except that the I. & G. N. occupies a very exposed condition in the Brazos bottom for practically 70 miles, and except that it crossed every river in Texas. The M. K. T. had bad places, but the I. & G. N. was on lower ground than the other railroads, and could not recover so quickly.

The other railroads in Texas are not so largely tied to South bound traffic as the I. & G. N. The Santa Fe has a better balanced situation, the M. K. & T. by acquiring properties in East Texas, or in controlling the originating of freight was in a position to give the I. & G. N. only the bridge haul, or short haul. The I. & G. N. is in very good condition for connections, and occupies a good territory, and considered by itself, is a much better road than the G. H. & S. A. as to territory, but the Santa Fe and the M. K. & T. occupy, perhaps, a better territory than the I. & G. N.—a little better. The I. & G. N. is not a finished railroad, but an incomplete one—it has never been finished, and this is more true than of the railroads mentioned, its principal competitors. Of course, a railroad is hardly ever finished.

As to the depredations of the Parcels Post—part of that increase may have been taken away from freight traffic and part from express traffic. It was shown by tables that express revenues for the railroad in 1909 were $151,791.82. For the next year about the same, for 1911 $165,538.83.

The witness did not remember, but thought that the Parcels Post was inaugurated in 1912 or 1913, say March 4th, 1913. For 1912 these revenues were $188,000.00 and odd dollars, for 1913 $252,-000.00, for 1914 $206,000.00 and odd dollars. The witness thought that a new express contract had been made about this time, more favorable to the Railway, changing from the Wells Fargo to the Pacific Express, and giving the railroad a greater territory to draw from.

In 1913 mail revenue was $254,000.00, express $252,-
287 000.00, the year Parcels Post took effect. In 1914 the mail was increased to $262,000.00, the express decreased from $252,000.00 to $206,000 indicating that the Parcels Post took some business from express. It is possible that the decrease in general traffic revenues between 1913 and 1914 are partly due to the natural course of business, and the effect of the war affecting all business, and that the farmers and others were affected.

The I. & G. N. has valuable franchises in Houston, one for two tracks on part of Commerce Street enabling the road to get right into the heart of the city, and worth a great deal from a traffic standpoint, with perhaps a better located freight depot than any

other railroad. The witness thought that this Commerce Street franchise was worth what was paid for it in 1903, or 1904; that he would not give it up because the road had spent a good deal of money building the depot, etc., and did not want to give it up. The road had various other franchises, industry tracks and street crossing privileges, all more or less valuable, enabling it to go down to the Turning Basin, and warehouses there, and particularly to handle all traffic offered it, being the only road which served those warehouses. He thought the value would go with the development of the Houston Ship Channel.

In San Antonio the road had principally industrial track privileges, but none in Fort Worth, using the T. & P. terminals. Some in Palestine, none in Galveston.

The franchises in Houston he considered added something to the value of the properties as a whole.

On Redirect Examination Mr. Booth testified:

The I. & G. N. owns the nearest tracks on the South side to the Turning Basin, the next was the G. H. & S. A., further out. The wharf on the South side and the warehouse owned by the City and reached by tracks belonging to the City were operated by the I. & G. N. but the I. & G. N. had no monopoly whatever, all business on that wharf was open to solicitation, so the advantage of the I. & G. N. was of being able to get better service out of Houston, but this was a temporary advantage, as the city had planned a yard of its
288 own, which it expects to operate. To this testimony the defendants objected, and excepted. The witness had a plan of the City's wharf developments showing that both the I. & G. N. and the G. H. & S. A. on the South side, and the actual switching facilities now connect with other roads than the I. & G. N. The G. H. & S. A. tracks on the South side being *id*stant from the warehouse 1,500 feet to 2,000 feet, and the I. & G. N. had no monopoly of that water front whatever. On the North side around the Turning Basin the city was putting in very large wharves, and the nearest tracks on that side belong to the Sunset-Central, and the city was understood to contemplate putting in another wharf on the South side, South of the Turning Basin. When these improvements are completed, the wharves will be linked up with the I. & G. N., or G. H. & S. A. and the Sunset-Central and every railroad, for the purpose of solicitation of freight, would have access.

In answering Mr. Nickels, the witness did not undertake to say the net profits in the mail revenues would overcome the net losses in the express revenues.

Re-cross by Defendants.

The witness said that at present the I. & G. N. got a switching charge on all traffic that comes on the bayou to the wharf near the Turning Basin, amounting to one boat every ten days, about 90% of which is for Houston proper, and on it the I. & G. N. got $5.00 per car, which hardly covers the cost of per diem, having to assemble the equipment prior to the arrival of the vessel. The average de-

tention of the equipment is ten days, and the per diem 45¢, making a total per diem of $4.50 as against $5.00 total charge. This traffic could be routed by the I. & G. N. were it not for the fact that the shippers always routed it. The I. G. N. would take the long haul on it, if it had the opportunity, and if there should be considerable traffic in the future, its position would give it command of it.

Re-direct.

Witness stated he thought that the switching charge resulted in a loss and was not compensatory.

289 (13) Thornwell Fay was called by the Plaintiffs and testified: He is, by profession, a railroad man; at present, and since August 31st, 1914, Assistant to the Receivers of the I. & G. N. Ry. and has been engaged in railroad work since 1878, practically spending his life in it, passing through the telegraph, the agency, the dispatching, the general office, the managing and President Departments.

The witness stated that he had been in Texas since April, 1904, principally in the service of the Sunset-Central Lines in the capacity of General Manager, Vice-President, and that; since 1904 as a principal operating official; he has had a wide view of Texas railroad conditions and is fairly familiar with the railroad situation.

On January 1st, 1915, the I. & G. N. Railway was a standard gauge railroad, but has never been a completed railroad in the sense of being thoroughly ballasted and equipped. A railroad is like a manufacturing plant, it manufactures transportation instead of buggies and plows, and that goods can be manufactured cheaper in a properly constructed plant than in one not properly constructed, and so of a railroad of which the track is the very foundation of economical operation.

The I. & G. N. is 1,105 miles long, and when this receivership was taken out about 150 miles were ballasted and no more was ballasted up to January 1st, 1915. Since then in 1915 about 130 miles. Therefore, on January 1st, 1915, 150 miles were ballasted and the balance of the 1,105 miles surfaced with natural soil, principally from alongside the track.

As a result of the lack of ballast there were a great many derailments, which were almost daily occurrences during wet weather, sometimes some damage—sometimes a great deal of damage, and the risk and expense of operating such a track is very much increased over that of a normal track. A good track is the foundation of a railroad and the first requisite, but there are others. On Jan-
290 uary 1st, 1915, the rail was of various weights, a small number weighing 85 pounds to the yard, that is, three or four miles. Some weighed 80 pounds—there was a considerable mileage of 75 pounds and some of 70 and 56, the latter being between San Antonio and Laredo, and on some branch lines and the Mineola Branch. All the main lines should be at least 75 pounds to the yard. The witness said that he had prepared a statement a short

while ago showing that the road should have 231 miles of new rail within the next two years in order to take this light rail track up, which is worn out. This 231 miles included some 75 pound rail, but had been in the track 20 years or longer, and the witness considered that if rail had been down that long and it showed the least sign of wear, then it should be taken out.

As to yards and terminals, since the Receivership there has been some land bought for that purpose at San Antonio, but nothing done on it yet. The terminals at San Antonio, Houston, and Fort Worth are inadequate, and that economical operation makes it certainly advisable to bring the terminals up to a better condition, and it is an uneconomical operation of the terminals and freight yards to operate them in the condition they are.

As to the shops, the witness testified that the shops at Taylor, though small and known as "division shops," are good shops and rather modern, but that those at Palestine are inadequate and old, and the machinery in them is not up to date, and therefore, that the work of repairing locomotives and cars therein is made more expensive because the machines are old and the facilities not adapted to economical work; that the shops at Mart are not of much consequence, and that at Fort Worth the road uses the T. &. P. terminals and freight yards to some extent.

As to rolling stock, the witness testified that the road to come to a parity with other Texas roads, particularly the Cotton Belt, should have about 3,500 additional freight cars, and that the road had been paying in the past per diem, or rent to other roads for cars over one-half million dollars per annum, which was a heavy burden on the income; that this could be changed by having more cars.

291 That the depot facilities of the railroad, with one or two exceptions, are probably adequate.

Witness further stated that an estimate had been made shortly after the Receivers took hold as to the amount of money needed to put the Road on the basis of an economical operation, and that it would be approximately $6,000,000.00, and that if this sum was spent in a relatively short time, and not spread out over a number of years and the work done systematically and economically in that way, that amount would put the road in as good shape as to track and equipment, as any railroad in the state.

The witness said that he knew something about the financial end of a railroad, and that it is part of the business of the General Manager to constantly watch that, and that he had spent a good many anxious moments about the financial end of the I. & G. N. That the basis was the Railroad's net income, and that this was absolutely to be determined over a term of years so as to get an average experience, and that if a railroad showed a fair income for ten years it could establish a pretty good credit, and that an experience for fifteen years would be a fair test, in his opinion, and that he thought an experience for ten years would be a fair test. That it takes a good deal more to establish credit on a Texas Railroad than credit on railroads in other parts of the country, and a better showing. However, that the capitalization of Texas railroads in stocks and

bonds is lower than in any other state in the Union, and that a Texas road which would earn the interest on its bonds of all kinds and 6% on its stock, would have a fairly good credit, provided it was carried over a term of ten years, and that then the stocks and bonds would stand approximately at par.

Suppose the case of a Texas railroad, over an experience of fifteen years, making a net income of 4.66% on its stocks and bonds, and that its stocks were $4,822,000.00, would that make its stock worth a premium of over $8,000,000.00? The witness answered that there is no Texas railroad that has any bonds as low as 4.66%. The lowest he knew of was 5%, and that on the basis stated the
292 bonds would be at a discount. That his understanding was that the First Mortgage bonds of the Santa Fe, G., H. & S. A. and M. K. & T. generally bore 5% and 6%, but that he didn't think that Railroad Texas bonds first mortgage leaving a margin of ½ on the Commission valuation could get money that cheap now. That one reason for this condition is that the people in Texas don't put their own money into Texas railroads, because they don't get returns for it; that the witness had never known of Texas capital investing in Texas roads, unless they had an arrangement beforehand to sell out. That they sometimes engaged in promoting or building a road, but that they would not stay in one, but that Texas business men are too sharp to put their money out where they won't get adequate returns for it; that as to existing Texas railroads giving good margin for security, and what interest they had now to pay to get capital, the witness said he didn't know, except in a general way, but that the Receivers' certificates issued by the I. & G. N. Receivers are, he thought, good security, but that they have to pay 6%.

The witness was handed the sheet introduced in evidence above showing the application of net income to the Railroad Commission's valuations, 1901, 1902 and 1914 inclusive, and showing an experience of 4.636 per cent, and was asked as a railroad man, whether, taking that experience on the Railroad Commission's valuations, it is possible for that property to secure a par capitalization of $40,000,000.00 without putting in additional capital. He said that it was not; that a railroad enterprise is to be determined as to value by the net income over an experience of a proper number of years.

There was then handed to the witness the preliminary assessment and formula of the State Tax Board, and the final formula which showed the final figures, and adopted as intangibles of the road, that is, adopted by the State Tax Board, and introduced in evidence above, and the witness was asked to explain the formulas as a railroad man; he stated that he could not, that he could understand the figures but not the logic, and that these formulas reached no *whither* in determining anything, and that the values could prob-
293 ably be determined, as well by putting values in a hat and drawing them out.

This was not the first attempt he had made to understand these formulas; that he could not see any logic in them, and that it seemed to be an effort to arrive at the result; that he could see neither arithmatical nor logical reasoning; that he didn't see what the valuation

of the T. & P. Ry. had to do with the I. & G. N. and that he didn't regard the stock of the latter as of any value since it has been put in the hands of Receivers; that the only value attributable to it would be that if the people who owned the stock paid the debts of the road they could then come back into its possession through heir ownerships, but those debts are so heavy as to absolutely take away value from the ownership of the stock, and that he could not understand why a premium of $8,100,000.00 was put on the stock of the I. & G. N. par $4,822,000.00 when the stock had no value whatever; that he could not understand the use of the "ratio" so-called, of the T. & P. and why obtaining that by taking the average for four years, of the gross income of the T. & P. and dividing that average of the gross income by the total capitalization and getting that ratio of 12% or 12½% or ⅛ in common fractions, he could not understand why they took any such ratio, because there is no necessary or usual connection between gross income and capitalization.

It was then explained th it the gross income of the I. & G. N. was divided by its capitalization and a ratio stated to be 33.53 and that divided by 12½, the T. & P. ratio, whereby there resulted the figures 2.6824 and the questioner stated to the witness that his mind broke down at this point and he didn't see why this was done and the stock of the I. & G. N. multiplied by this last quotient. The witness answered that the method pursued on the two railroads didn't appear to him to be the same, because, on the T. & P. the value of the stock was reduced from $38,000,000.00, while on the I. & G. N. it was increased from $4,822,000.00 to $12,934,000.00, and that if the same method had been followed as on the T. & P. the capital
294 stock of the I. &. G. N. would have been multiplied by .3353, which would have reduced it closely down to 1/3 of $4,822,000 instead of putting it at $12,934,000.00.

The witness stated that taking the formula applied by the State Tax Board to the Ft. Worth & Rio Grande Railway and its ratio of 11.96, slightly below that of the T. & P. and applying the same method thereon as used in the case of the I. & G. N., that a multiplier was obtained of .9568, and that approximately the T. & P. multiplier of .125 of ⅛, and that applying the multiplier used, the F. W. & R. G. stock was depreciated 5% approximately, while the T. & P. was depreciated ⅞, and that there could be no logical explanation justifying the result obtained as to the Ft. Worth & Rio Grande in comparison with those of the T. & P.; that the method seemed to be entirely arbitrary.

The witness stated that there was no place of any consequence which he recalled where the I. & G. N. didn't have competition, a general trouble in Texas, there being too many railroads for the business; that it was necessary to compete with the competitors on the basis of service to get this business, and that consequently freight trains had to be operated whether there was sufficient tonnage or not, and that if it were not for this competition one freight would be run where two are run, and expenses cut in two. The most successful railroads in the United States haul the biggest train loads

This competitive condition prevents the highest economy in the operation of the I. & G. N.

Outside of the competition factors, and those named, there are no other serious factors, except the one of the location of the road. It starts at Longview and is built at right angles across the entire drainage of the state, crossing every river in the State, except the Pecos, and is bound to be touched somewhere by every flood. Its competitors run North and South and parallel the drainage more nearly running with the water sheds.

For the I. & G. N. to meet this condition absolutely, it will be necessary to build your railroads on trestles forty or fifty feet above ground everywhere, but there are particular locations peculiarly liable to these breaks by floods, the Sabine River at Longview,
295 the Neches River, Wells Creek, just North of Palestine, the Navasota River, the Brazos, and last April actually a track was washed out on top of a hill, so there is no spot proof against cloud-bursts. In the Brazos bottom there are approximately 65 to 75 miles of track in it, or the Navasota bottom.

The witness stated that he never, in his experience, knew but one railroad rate to be advanced in Texas, on stone from Granite Mountain to Galveston. The rates have always been going down.

As to material used on the railroads, sometimes it fluctuates. The general tendency has been upward for the last ten or fifteen years.

As to labor, the increases in all except common labor, such as track labor, have been very heavy, track labor remaining about the same, except temporarily when it gets scarce.

Over objection and exception the witness testified that defining intangible values, as the value of an enterprise due to its profits as a going concern, after allowing for investment made therein for physicals, the I. & G. N. Ry. Co. in 1914 had none.

The witness was cross-examined by defendants and testified as follows: That good will was not physical and was a considerable asset, but whether the I. & G. N. had it will depend a good deal on the juries; that the road tried to please its customers and make as many friends as it could. Just how much friendliness or good will it had the witness said they had no way of knowing, but hoped they had it. But that his statement that the road had no intangible assets under the definition given was not incorrect, measured in money. The only other value which he considered entered into an intangible value was the problem of income. He was asked what difference it would make to him, as a tax payer, if his property was assessed on the wrong formula, provided it was assessed at the real value, and the witness said that as a tax payer he would insist on being assessed on the same basis as everybody else.

The witness said that he had been connected with the
296 Sunset-Central Lines a good while, including the G. H. & S. A. Directly for nine years, with the system for over thirty years and was familiar with the location of the G. H. & S. A., and that from Del Rio to El Paso the G. H. & S. A. is much less favorably located with respect to the production of business than any part of the I. & G. N., but that the rest of the G. H. & S. A. is just

as favorably located as the I. & G. N., but that from Del Rio East on the G. H. & S. A. with reference to local traffic, he thought the situation was about the same as on the I. & G. N., that the G. H. & S. A. has between 1,200 and 1,300 miles, but that in Texas 100 to 200 miles more than the I. & G. N., and that the intangibles on the G. H. & S. A. had been valued by the State Tax Board at $25,000,000.00 and the I. & G. N. at $10,000,000.00 in round figures, the G. H. & S. A. to be exact, being 1,326 miles and the I. & G. N. 1,105. That the intangible valuation would figure out for the G. H. & S. A. approximately $19,000.00 per mile as against $9,500.00 per mile for the I. & G. N. The witness considered that, taking the capital stock of the I. & G. N. at three for one, and the G. H. & S. A. at only one for one, would certainly make a discrimination; that he knew that the stock of the I. & G. N. had no such value as $300.00 per share, and didn't think that of the G. H. & S. A. was worth $100.00; that he didn't think the formula worked out in favor of the I. & G. N.; that the traffic of the G. H. & S. A. is very much heavier than that of the I. & G. N., they having an enormous trans-continental traffic, the I. & G. N. nothing like the G. H. & S. A. which had steamship connections at Galveston, and sometimes three ships a week.

As to Texas Railroad bonds, in order to get par for them the railroads would have to pay about 6%, although some bear only 5%. The amount of stocks and bonds per mile on Texas roads is much lower than any other state in the Union. The witness could not undertake to explain a good deal of railroad financing in the United States, nor why you could not find Texas railroad bonds on the market in Texas, nor did he know that Texas railroad bonds had always been turned into a system, or an outside com-
297 pany which would reissue against them, but thought that some Texas railroad bonds were quoted regularly on the New York Stock Exchange, which were the separate bonds and not system bonds. The witness had never heard, he said, of the I. & G. N. stock being on the market in Texas, or the New York Exchange, he didn't know about the status of the stock, as his connection with the road had been only since the Receivership he didn't know that the I. & G. N. corporation of Virginia owned the bulk of it, or anything of that corporation, but had heard that the greater portion of the stock was owned by the Gould estate, but he knew nothing about the Virginia corporation, nor of the interim certificates, nor had he discusseed them. He had never heard of anybody offering to give the stock away.

Witness further stated, describing the present condition of the property, that since the Receivers have had charge, they have finished ballasting through Harris County towards Palestine as far as Phelps; of this about 30 miles had been ballasted when they took charge. In Harris County the rail is part 80 pounds, balance 75 and 70, and the Columbia Tap is 56 and 52 pounds rails, that the ballasted track on the Palestine Division in Harris County is about as good as that in Bexar County, and that the track is ballasted between Taylor and San Antonio; that all terminal tracks are in about

the same general condition and inadequate. It is very necessary for the railroads and public to have good terminals, and the public all along the line are interested, it is dollars and cents to them, but it is doubtful whether good terminals at Houston would add something to the value of every mile of the road. The terminals in Harris County are quite valuable. That the value of a terminal is included in the value of the whole property, but there must be some point where the value of these terminals meet. The terminal in Houston could not extend over the whole property, nor those in San Antonio.

As to the operation into Galveston from Houston over the G. H. & H. track, the witness said, it was an expensive terminal proposition, and he sometimes questioned whether the I. & G. N.
298 would not be better off without it. He thought that it belonged to Harris and Galveston Counties exclusively, but that he thought that the road in other counties would be worth as much as it is worth if the I. & G. N. didn't have the use of the G. H. & H. track into Galveston, because there are other ways to get into Galveston; that considering the expense, he thought the arrangement not a good one for the I. & G. N., but for several reasons the Management did not want to set it aside, one, the loss of prestige. That a passenger train was run once a day each way between Galveston and Houston, the earnings of which are not sufficient to pay the rent for the Union Station in Galveston, to say nothing of the expense of operating the train. The witness said he thought that the Receivers had applied to the court to be authorized to continue the G. H. & H. arrangement. That he had discussed it with the Receivers, and that they did not want to make any change in the status of the property, that they did not know how long they would have charge, and that he did not make any recommendations, as far as he recollected.

There is a through line of mail cars operated from St. Louis to San Antonio, i. e. a car devoted exclusively to the mail service, and on other trains that there are cars devoted to mail and express, or mail and baggage, some of which are owned by the I. & G. N., some by the Iron Mountain. The average is about one mail car to a train on main line trains, the average size of passenger trains five and one-half cars. The railroad pays a porter who handles the mail at intermediate stations, and the railroad has to deliver the mail where the point of delivery is within 80 rods of the station. Ordinarily the porter regularly hired at the station handles the mail. Mail trains have to be installed where trains don't stop.

As to express, the railroad incurs no expense outside of the equipment, the handling is done by the express companies.

Seasoning means, as to road-beds, settling. The main line of the I. & G. N. between Mart and Longview is pretty well
299 seasoned, but there are a good many raw spots between Houston and Fort Worth.

As to the value of seasoning, and the length of time it takes, the witness stated he had no definite opinion, the problem depends too much on location and different situations.

As to the average life of a freight car, that depends on conditions. If it is in a wreck and thoroughly repaired and rebuilt, it may last indefinitely. Statistics are kept but each car has to be treated as a unit. The Road had bought some of the cheapest freight cars ever bought in this country last Summer, paying $860.00 each, being metal underframe box cars 36,000 pound capacity, 40 feet length. Repairs on foreign cars are taken care of on the line where they are, Repairs due to the fault of the handling line, or what is called "running repairs" are made by it at its cost. If due to inherent defect, or owner's fault, they are billed against the owner. As to whether it is better to own cars or pay per diem, there is difference of opinion. Per diem is accruing on cars every day in the year, at 45¢ a day, but the witness thought it was more economical for a railroad to own its cars then to rent them.

Redirect Examination by Plaintiffs.

The receivers could not get the money before January 1, 1915 to make up the $6,000,000.00 needed for the finishing of the railroad because it did not have the credit.

Looking at the formula used by the State Tax Board in the case of the G. H. & S. A. Railroad, it seems that having applied the formula, the State Tax Board had struck off $21,797,000.00 odd; even on a mileage basis the G. H. & S. A. ought to be worth considerably more, in physical value than the I. & G. N.

As to the contract by which the I. & G. N. is a tenant line of the G. H. & H. in and out of Galveston, from and to Houston, the witness said that that contract was not very valuable on account of the expense, and the terminal expense in Galveston, but that he didn't consider it more than a standoff between operating that
300 tenancy contract or turning the business loose at Houston and let it flow to Galveston.

At Houston the port is in its incipiency, there is one ocean steamer running every ten to fifteen days to Houston, and quite large expenditures being made by the city for wharves.

The witness stated that he thought the public was as much interested in good terminals in Houston as the Railroads. If all the Railroads stopped at the city limits and had no terminals, the expense of doing business in Houston would be enormously increased, if not prohibited, on account of drayage and handling.

(14) W. L. Holder, was called by the plaintiffs and testified on their examination as follows:

The witness is Land & Tax Commissioner in the service of the Receivers of the I. & G. N., holding that position since December, 1914, and the death of his predecessor, Mr. Cunningham. Prior to that time he had been agent at San Antonio in the service of the Traffic Department. He was present at the hearing before the State Tax Board in June, 1915; that he had heard transcript of the proceedings held before the State Tax Board read as testimony in this case, and that it was all correct, except the date of his appointment,

which should be December 15th, 1914, instead of December 15th, 1915.

That in 1900 the I. & G. N. properties paid a total tax of $59,-626.18; in 1901 $103,391.30; in 1902, $106,622.22; in 1903, $121,-157.90; that the witness thought that the Fort Worth Division was completed about 1903 or 1904; that in 1904 the road paid $127,-304.81; in 1905 $138,841.78; in 1906, $173,592.63; in 1907, $271,-674.30; in 1908, $241,596.30, in 1909, $253,995.75; in 1910, $250,-031.78; in 1911, $304,180.57; in 1912, $311,909.88; in 1913, $367,-630.11; in 1914 approximately $371,439.36. In 1905 the assessed value of the I. & G. N. properties was $10,867,260.00.

The intangible tax law went into effect in 1906. In 1914 the assessed value of tangibles was $15,825,148.00.

In the statement of taxes paid for 1914 is included items
301 for $1,278.84 taxes paid by the Railroad on the Hospital and some Western lands.

The witness stated that he took charge of his present position on December 15th, 1914, succeeded Mr. Cunningham, recently deceased, and that there were many details he was unfamiliar with, and that the report to the State Tax Board in 1915 was made before March 1st; that the clerk who had been in the office about fifteen years prepared the data, and the witness sent it in, knowing very little about the correctness of the figures, and relied on the clerk, and she showed the valuation of tangibles in a mechanical way, not taking into consideration increases allowed by the Railroad Commission on account of improvements, additions and betterments, and that he had explained this to the Tax Board at the hearing in June, 1915. That the report showed $26,026,810.78 as the Commission's valuation of physical properties, or whatever it meant, exclusive of rolling stock; whereas its valuation was $32,471,027.05 inclusive of rolling stock. Also that it had been explained to the State Tax Board that the Railroad Commission's valuation did not include certain values, that the figures for those were given them.

In the report made to the State Tax Board for 1915 is a statement of the assessed value and the true value, that is, the tangible value owned by the Railroad in each county. This was made as has been explained by the witness, in his office, and not by Mr. Werner, the Auditor; that as to the mileage in each county on the assessed value of the property in the county assessed locally, these figures are substantially correct, the mileage being furnished by the Railroad Commission.

The witness said that the rolling stock for the whole Road is assessed in the county where the railroad is domiciled, and proportioned on a mileage basis.

Cross-examination of the Witness Holder.

By Defendants.

The $27,966,444.00 total contained in the statement to the State Tax Board for 1915 includes the total taxable assessments exclusive of rolling stock, which, when added, adds up $30,303,735.00.

So, excluding intangibles making a percentage of nearly
302 100% upon the Railroad Commission valuation, or putting in additions and betterments, a percentage of practically 30/34th.

As compared with 1914 the State Tax Board decreased its valuation of intangibles by $3,000,000.00; they were $14,000,000.00 approximately, for 1914, and $10,700,000.00 approximately for 1915. For 1915 the total assessment of tangibles and intangibles including rolling stock, would be $26,255,902.00, or a little over 82% of the value of $34,000,000.00.

The witness presumed that he was supposed to be able to handle his place; that it was his duty to be familiar with different classes of the property, but that he had not been in the place very long, and had to rely somewhat upon what his predecessor had done, taking the records as he had left them; that he did not know that he had read the statutes; that as to his rendition, he thought that it stated that it included the property owned in a certain county; that he filed a sworn statement in each county showing the aggregate of the physicals in the county, exclusive of rolling stock, at about $14,000,000.00, and in Harris County, exclusive of the rolling stock, for 1915 $964,275.00, and that the apportionment of the rolling stock for Harris County was $141,603.00 and the rolling stock for the whole state was $2,168,906.00, and that the rendition of physicals, including rolling stock, was about $6,000,000.00, or 50% of the Railroad Commision valuation; that he had read the headings on the forms on which he had made the statements of rolling stock, and assessed values of other property to the State Tax Board, and that it stated "Assessed Value of Property in County Exclusive of Rolling Stock", but that he had not noticed that this was applied exclusively to tangible property, and that in filling them in he had included intangibles; that an advance notice was sent out showing what the intangibles would be, and that he, witness, had detected an error of about $4,000,000.00 in the figures and called on the Chairman of the State Tax Board, and that the matter was checked up, that is, the assessed value, with the Chairman of the Board at that time, but that he didn't think that this particular matter, that is, that he had misunderstood the
303 heading was not discovered until we were in the Federal Court.

That the total assessed value shown was $27,996,444. The witness said that he had never read the heading until this morning, which question was made because in the form it was folded down, or rather the prior page came over it, but that he made up the statement as carefully as if he was going to swear to it. Turning to the report for 1916 under the heading "Actual value of property in county exclusive of rolling stock" in each county, the witness stated that he had made up that list to the State Tax Board for this year 1916, and that the figure at the bottom, $18,780,534.88 represented the amounts apportioned to each county by the Railroad Commission, not including the next figure, $13,690,492.17 not apportioned by the Commission, leaving to be apportioned by the Commission, $13,000,000.00, there having been apportioned by the Commission as physicals in Harris County $1,660,393.98. The total assessed

value in Harris County of all elements subject to taxation was $1,709,-105.00 including intangibles.

Redirect Examination.

The $13,690,000.00 that the witness was asked about were additional valuation of physicals made by the Railroad Commission, and not distributed in counties, but put down in bulk, as it had not made the distribution thereof.

(15) At this point the Plaintiffs here stated that they desired to show the legal history of the properties of the I. & G. N. Ry. Company, and over the objections of the defendants introduced the following documents:

(*a*) Legislative charter of Sept. 1st, 1856, of the Houston Tap & Brazoria Railway Company for a railroad commenced at the City of Houston and then to run to the Brazos River, or to the Colorado River.

(*b*) Legislative charter of date October 26th, 1866, of the Houston & Great Northern Railroad the capital stock of $6,000,000.00 authorizing the construction of a railroad from Houston North to Red River, and providing that the Company so created might pur-
304 chase or otherwise acquire land necessary for its purposes, that its domicile should be in Houston and that it might form a junction with any other railroad.

(*c*) Legislative charter of August 5th, 1870, of the International Railroad authorizing construction of a road from a point on Red River to the Rio Grande River, at or near Laredo, and authority to build branches, and to connect with any other railroad in connection with, or in consolidation with such other railroad.

(*d*) Consolidation of the International and Houston & Great Northern Railroad into the I. & G. N. by agreement of the stockholders and directors of both Roads, effective September, 1873.

(*e*) Act of the Legislature of April 24th, 1874, referring to the consolidated Railroads as the I. & G. N. Railroad Company, and authorizing it to borrow money and to convert the bonds of either the International or H. & G. N.; Act of Legislature March 10th, 1875, proposing a compromise with the I. & G. N. R. R. of the claim of the International for $10,000.00 per mile.

(*f*) Decree of the United States Court at Austin, in 1879 foreclosing mortgage of the International Railroad in suit versus it and I. & G. N. Railroad and decree of court affirming the sale of properties under last decree and Master's deeds thereunder conveying the properties to Kennedy & Sloan, Trustees.

(*g*) Decree of the United States at Austin, 1879 foreclosing mortgage of International and H. & G. N. Railroads in suit against them and I. & G. N., and decree of same year confirming sale thereunder and deed conveying the properties to Kennedy and Sloan, Trustees.

(*h*) Decree of United States Court in 1879 foreclosing mortgage of H. & G. N. Railroad, and decree confirming sale of the Master thereunder.

(*i*) Master's deed of 1879 to Kennedy and Sloan, Trustees, and deed from Kennedy and Sloan, Trustees, to the I. & G. N. Railroad, all of the properties purchased by them.

(*j*) There was a Receivership of the I. & G. N. Railroad in
305 1888 running for several years, with Bonner and Eddy and Campbell Receivers, without foreclosure.

(*k*) Bill in the United States Circuit Court for the Northern District of Texas, with mortgage attached, being the Third Mortgage of 1893 of the I. & G. N. Railroad, and appointment of Thos. J. Freeman, Receiver, on this Bill in 1908 by the United States Circuit Court for the Northern District of Texas.

(*l*) Decree of foreclosure of the mortgage of 1881 entered in United States Circuit Court for the Northern District of Texas on May 10th, 1910. This was the Second Mortgage of the Railroad and was foreclosed in the Receivership proceedings at the instance of the Trustee, the Farmers Loan & Trust Company. In this decree it was stated that the Third Mortgage dated March 1st, 1892, was outstanding in bonds and bond script, of the face value of $2,966,-052.50, and that this Third Mortgage was subject to the First Mortgage of date December 1st, 1879, and the Second Mortgage of June 15th, 1881. It was directed that all of the lands and properties of the I. & G. N. Railroad should be sold; that the lien of the Mortgage of June 15th, 1881 should be foreclosed; that this mortgage had outstanding $10,391,000.00 face value of bonds with interest at 5%, payable semi-annually from the 1st of March, 1908, and the properties were directed to be sold, with order to make the amounts due.

(*m*) The report of the sale made under this decree of May 10th, 1910, showing sale on June 13th, 1911, of the whole railroad to Nicodemus for $12,645,000.00, report being made by the Master Commissioner appointed to make the sale, and purchase being made by the owners of the decree of foreclosure represented by Nicodemus.

(*n*) Final decree confirming the sale and directing that conveyance should be made to the I. & G. N. Railway Company, organized in 1911, and the Assignee of the purchaser.

(*o*) Deed from the Master Commissioner, and the sold out Railroad, and Farmers Loan & Trust Company, foreclosing Trustee, to the International & Great Northern Railway Company
306 chartered in August, 1911, conveying all the properties to the I. & G. N. Ry. The property was sold for approximately amount of the decree of foreclosure.

(16) It was agreed that plaintiffs had paid before February, 1916, to the Tax Collector of Harris County all of the taxes assessed on its tangibles for the year 1915, to-wit: $16,906.49.

(17) J. H. Wolf was called by plaintiffs and testified: Is an abstract maker and works for the Texas Abstract Company of Houston.

He, with another man, had made a list of all deeds for the year 1915, of land transactions in Harris County, so far as they purport to show the consideration for which the land was sold, and he had in his hand the large document representing the results of their labors.

The work was done by Mr. Peden and himself as follows: Started with the date 1915 taking all instruments dated in that year, as far as they could, and took the consideration leaf by leaf from the deed books at first taking every deed where the consideration was shown, but after two or three days, taking all over $250.00. After this abstract was made of the instruments, then they went to the Assessor's office and got the assessment of the property for 1915, the final assessment after the Board of Equalization finished.

The defendants here objected to this testimony of the witnesses Wolf and Peden on these matters, but over their objections and exceptions the testimony was admitted, and the witness further testified:

The sheets which he held in his hands were accurately compiled, the witness was an experienced abstract worker, each transaction was stated under the following heads: "Vendor, Vendee, nature of the property, description of the property, lots or acreage, survey, date of deed, where recorded, consideration in deed, and assessed value", and this was all carried out on one line or space, the witness
307 testifying from and having the results of the work of himself and companion in his hands.

The witness further testified that the total values of considerations stated in the deeds, and assessed values had been aggregated sheet by sheet, and that these aggregates had been summed up by him, and that his additions were correct; that the total of the considerations was $3,352,895.63, and that the total assessed values was $1,544,769.00 and that the percentage of the assessed value to the total of the considerations stated in the deeds was .46072. The witness had omitted all deeds, transactions and pieces of land which were deeds of gift or exchanges, and which did not express a money consideration, and had not placed them upon his sheets.

Cross-examination by defendants:

The witness said that he knew nothing personally of the true value of the properties, he merely went through the deeds and the Assessor's records; that he and his associate did not go back of 1915 at all. He found the first recorded deed in 1915 filed on the 2nd day of January; that they did not take every deed that was recorded, but only those where the consideration was all recited, omitting trustee's deeds, deeds on consideration of love and affection, or of $1.00, taking the deeds where the entire consideration was paid in cash, or part cash and part vendor's lien notes, and practically no others, possibly amounting to 1/3 of all the transactions in 1915; that probably his sheets did not reflect quite 1/3 of the deed record transactions of

1915, as he took only those expressing a cash consideration, or part cash and part vendor's lien notes. He was sure it would be a bit less than 1/3.

(18) J. R. Peden was introduced by the plaintiffs and testified that he worked in the abstract business and assisted Mr. Wolf in making the sheets just testified about, that he and Mr. Wolf worked together, one dictating and one putting down; that the work was their joint work and was accurately done, except that the witness didn't do the summations and calculate the proportion, Mr. Wolf did that.

308 (19) The plaintiffs next introduced in evidence a map of Harris County, sub-divided, showing the respective school districts in colors. This map is among the roll of maps herewith, marked "Exhibit 1" and made a part of this statement.

(20) J. M. Heiser, called by the plaintiffs, next testified: His business is that of real estate and loans, and up to the time when Mr. Miller went out of office of Tax Assessor of Harris County, after the Fall election 1914, the witness had been ten years Chief Deputy in the Tax Assessor's Office, with the duty to represent Tax Assessor in his absence, and the general duties of passing on all assessments which came in, especially those which came in from the county, there being deputies in the county. Each deputy had certain school districts in his charge, and if these assessments sent in to the witness were not approved by him he referred them to the Board of Equalization.

The witness had examined the system maintained by the present Assessor, Mr. Moody; he pursued the school district system in force under Mr. Miller.

The witness had gone into Mr. Moody's office and investigated the system pursued by him and found that the same values which practically obtained for 1914 had been adopted.

The system had been and was this: A man would come in to assess his property and it was located in a school district, and then the rate adopted for that school district would be applied. The witness had made investigation of tax assessments by school districts for 1915.

He knew in a general way the soil of the different school districts and a number of the farmers and could give, in a general way, some description of the soil and general typography of the land. He could state, in a general way whether it was partly prairie or partly wooded.

Having reference to map "Exhibit No. 2" showing the school districts of the county, the witness said: That school District 1 lies in the Northern part of the county, North of the H. & T. C.
309 Railway as shown on the map. The soil was sandy, some timber.

The witness stated that generally while he was in the Assessor's office he took note of the course of real estate values and sales, and kept in contact with the general course of sales of lands in Harris

County, and their market values, and had since endeavored to study values since he had gone out of office; that lands had declined in value for 1915 in Harris County.

Returning to school district No. 1, the witness said that for 1915 he thought the reasonable market value of land in that district was from $15.00 to $17.50 per acre. The witness said that he had gone through and examined the assessments for 1915, which were made by the different surveys and not put on the roll by school districts. Over objection the witness stated the lands in school district 1 were finally equalized and passed by the Board for 1915 at between $5.00 and $6.00 per acre for the whole district.

This testimony was introduced over objection and exception of the defendants.

The witness said that there was a system when he was in office for the valuation of lands in that school district at $5.00, and thought that system was carried forward to the present time, as he had determined by examining the records.

School district No. 2, as shown on the map, lies in the Northern part of the county, bounded by Cypress Creek, is prairie and wooded, some farms, mainly farms outside of timber, and that the reasonable market value in 1915 in cash, or its equivalent, was $18.00 per acre, of $17.50 on the average, and in 1915 the lands in this district were approved and assessed at $5.00 and $6.00 per acre.

School district 3 shown on the map is crossed by the Ft. Worth Division of the I. & G. N. Railway. Soil about the same as No. 2, perhaps the Northern part not so good, some wood and some prairie, German settlement of pretty thrifty farmers on it, and the reasonable market value of the land in 1915, at an average of
310 $17.50 per acre. It was assessed that year at $5.00 and $6.00 per acre, practically all of it.

Witness stated that when land goes on the unrendered roll, any kind of value may be put on it, of that the witness was not speaking.

School district No. 4 lies South West of Houston, adjoining it. The S. A. & A. P. and G. H. & S. A. run through it. The land is generally sticky, black soil, bounded on North by Buffalo Bayou, on the South by Brays Bayou. Some few people live out there who work in the City of Houston, and the Rice Institute is mostly within that district, except wherein in the city limits. The street car runs through it. There are little settlements and towns out in it. The lands, the witness considered, would be of varying values on January 1st, 1915; that bordering the city worth about $1,250.00 an acre, that is, bordering the city on the West. On the Gamble Survey worth about $2,000.00 per acre; along the Boulevard $1,200.00 or $1,400.00 and $600.00 per acre, and immediately along the Boulevard.

The witness put varying values on the land. In the Northern part of the Reynolds he thought would not be worth as much as $350.00 per acre, and for the whole school district, striking a general average, taking the least figure, he thought the market value in 1915 was about $450.00 to $500.00 per acre. It was assessed that year in the Reynolds $75.00, and up the East line of the school district adjoin-

ing the city $250.00, along Main Street $250.00, that is, the land selling at about $1,250.00 per acre, and outside of that, assessed at about $700.00 per acre. That the assessments in the district would run about ¼ of the true value.

To this testimony the defendants objected, and over their objection and exception, it was admitted.

The witness thought that the land around the Rice Institute in 1915 was of the reasonable value of $2,000.00 per acre, and that the Hermann Estate, between the Rice Institute and the City assessed at about $700.00 per acre, or in the proportion of a little over one-third of what he considered its market value.

311 As to the Smith Estate, it was assessed at different figures, from $75.00 to $150.00 per acre, and worth $350.00 per acre up.

The witness testified in particular as to various surveys and tracts of land, testifying to assessments running generally on a proportion of not over 1/3 of what he stated to be the market value.

School district 5 lies in the Northern part of the county, North of the H. & T. C. Railroad, shown on the map, and is a sandy, somewhat second-rate soil, a German settlement, pretty extensively farmed; Southern part mostly grazing lands.

In 1915 the witness considered the average value of the land in that district to be $15.00 and $17.50 per acre on private market. It was assessed mostly at $5.00 per acre, a little at $6.00 per acre.

School district 6 lies across the H. & T. C. Railway, Northwest of the City. The lands are very sandy Northeast of Cypress, and Northeast of Cypress practically untillable. The average quality of the land is second rate farming land, a little better in the Southern part, with a few farmers. He considered the market price to have been in 1915 $20.00 to $25.00 per acre, assessed that year from $6.00 to $8.00 per acre.

Defendants cross-examined the witness on this school district as to the Moody survey. He said it had been assessed at $6.00 per acre and was worth, he thought, about $12.50 per acre.

Being examined by plaintiffs, the witness stated that School District 7 lies North of District 6, as shown on the map, light, sandy soil, some few German farmers in it. The market value in 1915 $17.50 per acre, assessed under the system of $5.00 and $6.00.

The system of assessment by school districts was to adopt a system valuation for each school district until one got right around the city.

Objections were made by the defendants, which were overruled and defendants excepted.

School District 8 lies South of Cypress Creek, in the North-

312 ern part of the county, as shown on the map, crossed by the T. & B. V. Railway. Some prairie land, a good deal of it woodland, a few farmers, along Cypress, sandy. The country is largely badly drained. In 1915 the market price would be about $17.50 per acre. It was assessed at $6.00 to $8.00, mostly $6.00 in 1915.

School District 9 joins No. 1 Northward. The Ft. Worth Division of the I. & G. N. Railway goes through two corners of it, and lies

in the Northern part of the county, as shown on the map, and is sandy soil, generally speaking, second rate land. The outlots of the town of Tom Ball are worth about $20.00 per acre, but these lots were assessed at $10.00 per acre, and outlying acreage at $5.00 to not over $8.00 per acre.

School District 10 is crossed by the H. & T. C. and M. K. & T. Railways, as shown on the map, and lies in the Western part of the County. Part of the soil is sandy, some of it heavy black loam, some of the best land in the county in it. The Northern part of this district witness considered to be in 1915 worth at private market $17.50 per acre, and this part was assessed at $6.00 to $8.00 per acre. Around Barker and South of this other land, it was assessed at $8.00 to $10.00 per acre, and South of the Bayou at not over 15.00 per acre. The land assessed at $10.00 and $15.00 per acre was worth $35.00 or $40.00 per acre in 1915.

School District No. 11 lies next to Waller County in the Northeast corner of the county, as shown on the map. The land is partly nice, sandy soil, and heavier than around Cypress, none of it better than good second rate soil, some farms, partly timber and partly prairie, and worth in 1915 $18.00 to $20.00 per acre, assessed at $6.00 to $8.00 per acre on the plan.

School District No. 12 joins 11 on the North and runs to Montgomery County, is sandy soil, of second rate quality, worth in 1915, $17.00 to $18.00 per acre, and was assessed at $5.00 to $6.00 per acre on the plan.

School District No. 13 lies South of La Porte towards Galveston, with the town of Seabrook in it, crossed by the G. H. & H. Railroad.

313 The witness was asked to leave out all boom considerations in answering questions, or values supposed to be due, if any, to growing oranges, etc. He said that the soil was rather heavy West of Murphy Survey, supposed to be good, it fronted on the Bays. Seabrook was a little village.

The lots in Seabrook were partly assessed at $5.00 a lot, the higher ones at $25.00 a lot, on an average of about $16.00 a lot for the town. The houses, etc. at Seabrook and up and down Clear Creek were blown away by the storm. Eliminating Clear Creek front and Seabrook the witness thought the land was worth $40.00 to $50.00 per acre, still allowing something for the Clear Creek frontage, but completely eliminating that, at $45.00 to $50.00 an acre in 1915. It was assessed at $15.00 an acre as a minimum, and coming up to the Bay front intent was made to assess it at $30.00 or $35.00 an acre, and on Clear Creek at about $20.00 an acre on an average.

School District 14 lies West of La Porte, as shown on the map, and crossed by the G. H. & S. A. Railroad to Galveston, and the San Jacinto Battle Field is on it on the Bayou. Some of it is black soil, some places a little bit lighter. Part of it is in drainage district. Along the Bayou the land was worth in 1915, from $100.00 to $150.00 per acre, and was assessed along the Bayou, from $20.00 to $35.00 an acre. Coming away from the Bayou the land was worth

from $70.00 to $80.00 per acre up towards the Railway. The whole district was an average value of about $60.00 per acre, and it was assessed at a minimum of $20.00, and a maximum of $30.00 in 1915.

School District 15 lies on Cedar Bayou, and includes part of the Goose Creek oil field, as shown on the map, a small oil field not amounting to much, so far. The witness was asked to exclude all oil values. He said that the land was heavy, good farm lands, with many farmers, mostly Germans. The average value in 1915 about $30.00 per acre, and assessed in that year about $8.00 to $10.00 per acre.

School District No. 16 on Buffalo Bayou below the city, including Clinton in its upper corner on the Bayou. The Northern
314 part of it is light, sandy soil, Southern heavier, and the lower swampy, and timber farming activities, small bayou front considered to be of higher value, and very long, and worth for one-half mile to a mile back, $150.00 per acre. The S. P. have terminals at Clinton, etc. A mile to one-half mile back from the Bayou the witness thought the land worth from $20.00 to $25.00 per acre in 1915, and this back land assessed in 1915, from $8.00 to $12.50 per acre, the Bayou front assessed from $10.00 to $40.00 an acre.

School District No. 17 is on the East side of the county, crossed by the T. & N. O. Railroad, as shown on the map. The station of Crobsy is on it, partly wooded, cut over land, partly heavy, black soil, and fine farming land, with a large settlement, of Bohemians, Swedes and Germans. Farming lands worth $25.00 to $35.00 per acre, the balance about $25.00. In School District assessed from $7.50 to $10.00 per acre on the system.

School District 18 situated on the San Jacinto front, fronting on the Bayou, shown on map, that is, situated on the San Jacinto River and Buffalo Bayou, and soil something like that of No. 16, and a few farmers on it. The market value in 1915, $18.00 to $20.00 per acre, assessed on the plan at $7.00 to $10.00 per acre.

School District 19 is on the G. H. & H. Railroad, and includes Webster, including Clear Creek frontage. The witness estimated the value in 1915 at $40.00 to $50.00 per acre. It was assessed on the system from $20.00 to $30.00 per acre. It was assessed at a higher rate than most lands on these valuations. It is on the Interurban Railroad. Building lots were assessed at $25.00 per lot, worth from $50.00 to $100.00, probably, per lot.

School District 20 includes Harrisburg and joins the City of Houston, and is astride the Bayou. The land around Harrisburg is sandy, and so is it North of the Bayou, it is heavier as you go South. Magnolia Park and Central Park and Harrisburg lie in it; Magnolia Park is incorporated. The Turning Basin is in the City of Houston, as are the Municipal Wharves. From the City of Houston and Turning Basin going up along the line of the city, and up the Bayou, passing the off-side South of the Bayou, which in-
315 cludes the Turning Basin, the land is worth about $4,000.00 an acre, and was assessed at $350.00 in 1915. Coming down the Bayou below the Turning Basin the land is worth about $400.00 an acre, and was assessed at $350.00 in 1915. Coming down the

Bayou below the Turning Basin the I. & G. N. owns acreage down there, which is assessed as a part of the Railway, at $40,000.00 to $45,000.00 per mile, the witness thought, but was not pos-tive. The I. & G. N. the witness thought, had about 90 acres down there on the Bayou, and estimated this land as worth $3,000.00 an acre, and the land down below on the Bayou he valued at $3,000.00 to $4,000.00 per acre.

Down about Brays Bayou the witness thought that the assessment had been from $500.00 to $600.00 per acre. Other land in that vicinity he said was worth $1,200.00 to $1,500.00 an acre, assessed at $125.00 an acre. Coming below Harrisburg on the Bayou, he thought he estimated the land to be worth $750.00 per acre Bayou front, assessed, at least part of it, at $50.00 per acre.

A portion of the Brown Survey adjoining the Turning Basin, and the City of Houston north of the Bayou, and next to the Turning Basin, the witness thought it had been worth, in 1915, $2,000.00 per acre, and assessed at $350.00, or not over that amount. Coming below the Turning Basin on the Bayou on the North side, the witness considered it to have been worth $1,250.00 per acre, and assessed at not over $250.00. As to the land on the Brown Survey in this school district, away from the Bayou, the witness thought that it had been worth, in 1915, $600.00 per acre, and assessed at not over —— per acre, but the witness didn't include in these statements the Northern end of the Brown Survey in the Northern part next to the City, which he considered to be worth, in 1915, $150.00 to $500.00 per acre, and assessed from $35.00 to $75.00 per acre.

The defendants objected to this testimony, and it was admitted over their objection and exception.

Coming to the acreage on Brays Bayou, the witness valued it at about $1,250.00, and stated that it was assessed in 1915 at $350.00 maximum in the Williams Survey.

316 The Thomas Survey the witness thought was worth, on an average, away from the Bayou, $500.00 per acre, largely urban property, and was assessed, with the exception of the lots in Brookline at $175.00 per acre.

On the Harris survey the land was assessed from $50.00 to $175.00 per acre, and worth from $100.00 to $500.00 per acre.

When the City is approached, the Board could not so well follow a system, but had to specialize more.

On the Vince and Harris Surveys, the assessments were attempted to be maintained at nothing less than $50.00 per acre.

The witness returned to his testimony previously given, and said that he had made an investigation, and that he had found two errors in his testimony, to-wit: The assessed values on Main Street and the East line of the Reynolds Survey, and particularly the Warneke tract had been stated by him to be not over $350.00 per acre, but that on investigation he found that it was assessed at bulk at $400.00 per acre for 1915, and that he had stated that the Rick acreage at the Turning Basin was not assessed higher than $350.00 per acre, but that he had found some of it assessed at $450.00 per acre, and he desired to make these corrections.

Returning to School District 20, the witness said the minimum assessment values on the Calhoun and Vince, Abstract 9, was $50.00 per acre, and that he thought that the assessments ran not over $100.00 per acre.

The witness stated that School District 21 no longer existed, it had been absorbed in 20.

As to School District 22, which lies next to Fort Bend County, and is shown on the map and crossed by the S. P. Railway, the witness said that it was all flat prairie, with the exception of along Brays Bayou, and nice black soil; over in the Eastern part lighter sand. Pierce Junction is near one corner. Some farmers around Pierce Junction.

Witness was here asked to state whether he was testifying from memorandum and said that he was, that he had made it and dictated it and had it copied and used it with memoranda he had
317 made on it from the assessments to guide himself in his testimony; that he dictated it in the office of plaintiffs attorneys; that he had obtained the information which he had put on this memoranda from the Assessor's office, and checked it up in a general way to see if correct; that his testimony was not off-hand, but was prepared and studied by him.

Questioned by plaintiffs' attorneys he said that as to School District 22 the Southern part of it had practically no value, except as farming land, that as one approached the city one lost track of its agricultural value on account of its proximity to the city. That from Pierce Junction North up towards the city he thought that the land was worth 1915 not less than $80.00 to $85.00 per acre. The minimum of value, however, on the Rose about $60.00 per acre, the assessment from $30.00 to $60.00 per acre. As to the balance of the School District he thought that the land was worth in 1915 market value $35.00 to $40.00 per acre, and that it was assessed that year at $15.00 to $30.00 per acre.

That land on the Rose Survey would run from $50.00 to $500.00 per acre, the situation was somewhat complicated as you approached the city.

318 (21) At this point it was agreed that the direct examination of Mr. Heiser might be discontinued in order to put on the witness Blake, chief deputy in the Tax Assessor's office, Mr. Moody, the tax collector, having been seriously injured and not being available. Accordingly Mr. Blake was called by the plaintiffs and testified as follows:

His name is Cabeen Blake and he is chief clerk in the assessor's office. He was in that office under Mr. Moody's predecessor, Mr. Miller, and this is his twelfth year therein. As to rural property outside of those in the school districts adjoining the City of Houston, in Harris County, there was a general system of valuation, that is school districts were adopted as a basis of valuation, and leaving those out adjoining the City of Houston, there was an average value in each school district, and of course, there was a maximum. Over objections and exceptions of the defendants the witness testified that in 1915 the basis for assessment of the whole county was

supposed to be 66-2/3 per cent; this was not limited to the school districts. That as to bank stock, the assessor took 70 per cent of the book value, considering that 70 per cent of the book value was nearer the actual value than 66-2/3 would be; that is, it was thought that by taking 70 per cent of the book value the assessment of bank stock would probably hit 66-2/3 per cent of the actual value, and that the scheme or the effort to get 66-2/3 per cent of the value was generally worked in his office for 1915 and was approved by the Board of Equalization.

The board as a rule didn't take up any values except those referred to them by the assessor's office. In cases where the assessor's office were unable to agree with the taxpayer, it was referred to the Board, which acts as a board of arbitration rather than as a board of equalization. These references to the board might be made by any deputies who happened to be waiting on the taxpayer, and the witness went before the board at these hearings. The in-
319 struction of the board to the assessor's office, and general instruction, was to obtain 66-2/3% of the value, and the witness thought that not over eight or ten per cent of all the assessments went before the board, to-wit, of the taxpayers who did not agree with the assessments placed in the office. It was not quite the system in 1915 to accept the assessments of the taxpayers when they put down the value reading 66-2/3 per cent. The system was this: The office already had the figures made out, and if the taxpayer did not object to them he was not referred to the board. The values were placed by the office, and unless he objects they did not go before the board. As near as the office could arrive at it, the office was supposed to submit to the taxpayer a valuation of 66-2/3 per cent.

There is in the office a school district map of the county used as the basis of the system for fixing values, and in 1915 the same precedent was followed which had been followed previously, to-wit, the values were fixed according to school districts before the taxpayers commenced to assess. Generally these values were figured on an average, as from $7.50 to $10.00, or $6.00 to $8.00, according to the proximity to the city.

The Cypress School District has a little station in it, but is purely rural, No. 6. The witness said that he had some of these assessments by heart, and that with some he was not as familiar as Mr. Heiser, who had handled it for ten years where witness had handled it for one.

The witness has been in the assessor's office of Harris County for twelve years, and worked four years in the City Assessor's office, and before that for a portion of his mature life was in the Planters and Mechanics Bank. Since he has been in the assessor's office it has been his duty to observe the course of values by sales, and that was his business and he has done so, in order to see what proportion of values were obtained, and that in his opinion in the rural school districts not better than 40 per cent of the values of lands
320 were obtained, and this is a general statement which the witness placed to the whole county except to those school districts adjoining the city.

As to money, loans and investments, the statement of taxpayers is taken absolutely and no investigation is made, and so as to personal property unless there is a stock of merchandise, which the assessors may examine. The office tried to get 66⅔ per cent of everything, but usually was satisfied with 50 per cent of property except merchandise, which was assessed with reference to his neighbors, and the witness thought that 50 per cent of merchandise is a fair estimate of values assessed, but in assessing merchandise it was done pretty much in proportion to a man's neighborhood and the assessment was two-thirds of it ordinarily, "but the reason I say 50 per cent is the minimum." If a man said he had a stock of merchandise worth $100,000.00, then they would put down say two-thirds of that amount.

If a man would come in and would say that he had a piece of land worth $15.00 or $18.00 per acre in a certain school district, the assessors would generally go to the block book, ask him what his improvements were worth, and take the improvements at 50 per cent in the rural district and the land at standards at which it had already been placed by school districts.

The standards of valuation in the school districts have not been changed since 1910.

As to range cattle, they were assessed at $8.00 per head. If a man would come in and say that he had 500 head of range cattle worth $25,000.00, they would be put down at $8.00 per head. That included calves and stock all around. If a man said he had 10 head, the assessment would be $80.00. This $8.00 per head was just the valuation placed and had not been changed for ten or fifteen years. Horses were assessed at $25.00 per head, that is range horses. If a man came in and said he had two horses worth $150.00, they were put down at that value, but the average man with a bunch of horses was put down at $25.00 per head, and this system of valuing horses and stock cattle has been enforced ever since the witness has
321 been in the office.

Sheep were assessed at $1.00 per head in 1915 and back as long as the witness had been in the office; swine at whatever a man would put them at, $2.50 would be the average assessment. "We do not consider any of them worth less than $5.00." Goats were assessed at 50 cents.

The general average of assessment of real estate values in rural school districts, that is in those not adjoining the city, for 1915 was not over 40 per cent. As to city values and the actual value of range cattle, the witness said he was not posted, nor on any other kind of stock. The assessment in round millions, that is the total assessment of Harris County and the total aggregate of its rolls for 1915 was approximately $134,000,000.00, including the city.

As to the County assessments of property in the City of Houston, the scheme to get 66⅔ per cent of values applied to the real estate in the city. Witness knew as to whether or not that proportion was reached, but had not done the work to determine that matter, but it had been done by Mr. Lidstone of his office, a real estate man specially engaged in working that matter out, and being the second deputy in the office.

Mr. Heiser was ten years chief clerk of the office, leaving it in the fall of 1914. The assessments were approximately the same in 1915 as in 1914, the assessors for 1915 adopting the 1914 assessments and carrying them forward as to land values, but if there was a big improvement, the assessor's office would take notice of it and add the improvement.

The witness had been second deputy before Mr. Heiser retired, Mr. Heiser first deputy.

Cross examined by defendants, the witness Blake testified that as to livestock he had kept up with the assessed values of his office "and that was standard;" that he was not qualified to testify as to what were the real values of live stock.

322 As to stocks of merchandise, he went out every year for ten years to inspect them, went into the stores and sized them up but made no inventory, just sized them up by comparing Bill Smith with Tom Jones and accepted the rendition that way. He did not keep up with either the wholesale or retail prices of merchandise, which was assessed entirely by comparison. Every man knew that his merchandise was not assessed at full value. In answer to the question of whether or not he could say as a fact that he did or did not get the full value of merchandise, the witness said that he was, not an expert merchandise man and not qualified on that. He knew that the assessments were not taken at full value for the reason that no man assessed his property at full value, but the assessments were taken by comparion with other men in the same line of business. Asked whether or not he knew that he got full value or less than full value except as a conclusion, the witness said: "Certainly that is my conclusion, that we got about 50 per cent of the value. I based that on my experience and having taken the other assessments." But that so far as actual experience and knowledge goes, he certainly did not know the value of the goods, but that he did not want it to go into the record that he did not know anything about them, as he was testifying merely to his conclusion.

As to personal property, the taxpayer's rendition or word for it was usually taken. He makes his rendition under oath and he felt that they had a right to rely on it.

The witness said that he never made any assessments on the ground, that they were all made in his office, but that he was familiar with some of the school districts; that he had been in school district in the Northeast corner of the county, he never examined the lands there, that he was soliciting votes, not examining the lands, and knows nothing of the land in that school district except to assess values.

As to land in School District 28, one is getting into the oil district there. It was worth about $10.00 per acre before they struck

323 oil, but now is in the heart of the oil field. Oil has been developed about eleven years. His idea as to values in that school district before oil was struck was derived from transfers in the papers once in a while, which he always read in connection with assessments; that he does not recall ever seeing a transfer of land in School District 28, and did not wish to qualify as a real estate expert

and would not so qualify as to any school district in the County, did not consider himself qualified on actual values; the assessed value is all that interested him. The witness could not say that he knew anything about the actual values, but that this expert business "kind of ties me up." The witness said that he did not wish to testify to anything that is not exactly so, that his general information about lands in the County is controlled by a great many things, what he hears, what he reads and the assessed value of the property, but that as an expert real estate man he is probably disqualified.

As to details, the witness said that he could not give special prices as of Main Street property, that if he named one piece of property in the county which he knew anything about he would be asked to name a dozen, and would rather say that he doesn't know, but that he would be willing to swear that the true value was not obtained in the assessed value of any piece of property in the county; "I know as a matter of general information that we have not got any," but this is his conclusion and that all of his testimony is his conclusion; that he is not an expert, but that on the other hand "neither am I a numb-skull, and I told you what my opinion is based on and that is all I can tell you;" that as a matter of general information, just what he had seen from the transfers and his experience in the tax office and knowledge of values in a general way, that he did not think the assessments were over 40 per cent outside of the city, but that all the detailed information he might give probably might one conflict with
the other, because he had never been in the real estate busi-
324 ness; that he had made no personal investigation and was perfectly willing to let his testimony go in that way, to-wit, that it was merely his conclusion from information gathered from various sources, excluding personal investigations.

That as to trying to get 66⅔ per cent of values, it was assumed that there was a market value and this percentage was attempted to be applied to the market value, but that he did not know the real value; that the attempt was to get 66⅔ per cent of the market value, "we try not to get over that." The witness said that he understood that market value included all elements, speculative and whatever elements might enter into the inducements for sale; that he understood it to be a fact that there is a difference between real and market values, and that no two men in Houston would agree on any values except Main Street property. The witness was asked whether or not an acre of farm land in School district 30, as to its producing value or income value when used as a farm, might vary from its market value. He said that it might vary if one struck oil, or something like that, and as to farming it might also vary and be speculative; that the percentage attempted to be obtained in assessments had reference to market value, and so he had testified all through his testimony; and that no notice was taken of the real or revenue producing value.

As to railroad property, the witness said that the assessor did not have very much to do with it. Rolling stock was submitted to the Commissioners' Court, which passed on it; that as to railroad property generally, Assessors had very little to do with it, or nothing.

The witness stated his recollection to be that railroad assessments had not been changed in twelve years, except that it may have been changed voluntarily, but that he meant that the Commissioners' Court had not taken issue with the railroad companies in twelve years, and that he, witness, was not qualified to go out and
325 look at the I. & G. N. mileage in the county and state and state its value, that this is a special class of property whose value is difficult to arrive at, and that the feeling that he felt, and that the feeling that manifested itself that I. & G. N. people are in a better position to classify their property than the witness, and that he had relied upon what they said about it.

(22) The witness J. M. Heiser, who had been on the stand before the witness Blake, was put on the stand, returned to the stand and continued his testimony on direct examination as follows:

He had made a memorandum from the County rolls for 1915, and that the total sum of values thereon were $133,204,807.00.

With reference to school district No. 20, shown on the map, adjoining the City of Houston and the Turning Basin, and lying on both sides of the Bayou, the witness said that there were 55.81 acres and 63.11 acres on the Ship Channel, right across from Harrisburg, assessed at $150.00 per acre, and conservatively worth on his estimate $600.00 per acre; that there was the Brady tract on the north side of the Bayou, right across from Harrisburg, with a large Bayou frontage, about 250 acres, assessed at $250.00 and $300.00 per acre, and worth in 1915 about $1,250.00 per acre.

That there was a tract assessed by Arnim Trustees, out of the S. M. Williams Survey, north of Brays Bayou, between it and the old Magnolia Park Addition, of 81.6 acres, and 53 acres in the Harris Survey, making a total of 135.53 acres, and also including about fifty lots in Magnolia Park, and assessed at $50,000.00, worth in his opinion in 1915 $135,000.00. That there is the Damon tract on Brays Bayou, adjoining Forrest Hill, fifty acres, assessed at $150.00 per acre, worth say $600.00 per acre. That there is the S. A. Allen 760 acres on the Harris Survey in the southern part, assessed at $60.00 per acre, reasonably worth $150.00 to $175.00. That there is the T. J. Collins assessment, land on the Harris and the
326 Thomas Surveys, 39 acres on the Harris and 194 on the Thomas, practically at Harrisburg, 39 acres with improvements, assessed at $5,850.00—there was a residence on it—or an average of about $150.00 per acre, worth in 1915 between $600.00 and $700.00 per acre. As to the 194 acres on the Thomas Survey, owned by Collins, assessed at $29,100.00, or about $150.00 per acre and worth between $600.00 and $700.00 per acre. And the Goodrich Survey on the G. H. & H. Ry. has 86.4 acres, assessed at $40.00 per acre, reasonably worth in 1915 about $150.00 per acre. That there is the Edmondson land on Brays Bayou, out of the Luke Moore Survey, 95 acres, assessed at $9,500.00, or $100.00 per acre, worth in 1915 about $350.00 per acre.

That there is out-lot 8 of the Moore Survey, with the Interurban through it, the Walsh tract of twelve and one-third acres, assessed

at $275.00 to $300.00 per acre, and worth about $900.00 per acre. This is partly in and partly out of the city. As to the Brady acreage on the Bayou front, the witness said that he corrected his testimony before dinner. It is assessed at little over $200.00 per acre, and worth about $1,250.00 per acre.

As to school district 22, southwest of the city, the witness said that he had the assessment of George Herman, who had about a thousand acres close up to the city, but practically all of it is south of Brays Bayou, which is shown on the map. It is not closer to the city than the land which Mr. Herman gave the City for a park, but lies south of Brays Bayou. The park land lies north of this 1,000 acres, which is on the Rose Survey, and adjoins Brays Bayou, and Main Street crosses it. The George Herman estate assessed in school district 22 1,055 acres at $109,025.00, or a little better than $100.00 per acre. It was worth on an average in 1915 at least $250.00 per acre.

The witness was questioned as to school district 23, shown on the map, west of the city and west of school district 4. He
327 said that he had testified that the land along the West line of the Reynolds Survey was assessed at somewhere between $65.00 and $75.00 per acre, and worth $350.00 to $400.00 per acre; that as to the land on the White Survey at Sandy Point, most of it was good land, some gullies, worth conservatively $200.00 per acre, and that the White was assessed at $35.00 to $50.00 per acre, and that as the land grew sandier at $15.00 to $35.00 per acre. That leaving out Bellaire and Westmoreland Farms and the White Survey, that he supposed the average value of the land in the school district would be $75.00 to $80.00 per acre, assessed at $15.00 to $35.00 per acre. Witness said that he checked up these assessments and figures and put them down from the rolls.

As to farm lots in Westmoreland and Bellaire, they were assessed at $25.00 to $100.00 per acre, according to their proximity to the Boulevard, and that he supposed this land was worth conservatively $100.00 to $450.00 per acre.

As to school district 24, the witness said that the southern part is a heavy sandy loam, reasonably heavy, towards Brays Bayou, that Rice Institute was in No. 4; that the Newman tract of 58 acres lay on the Tierwaster Survey and was assessed at $11,250.00 total, or about $250.00 per acre, and worth conservatively $600.00 to $750.00 per acre; that there were 10 acres in the Holman assessed at $200.00 per acre and not worth over $200.00 or $250.00 per acre. Tuffly's 10 acres was assessed at $100.00 per acre, worth about $300.00 per acre; that McIvor's land, 155½ acres north of the railway at Pierce Junction, assessed at $30.00 per acre, worth conservatively $75.00 per acre; south of Brays Bayou going away down from the city the assessment is about $20.00 per acre and about that amount on the southern line of the district, worth conservatively at least $50.00 per acre; so, going up north to Pierce Junction, the assessment goes up to $35.00 per acre, land worth $75.00 or $80.00, and leaving Pierce Junction to the Bayou assessed at not over $150.00 per acre and
328 worth from $100.00 to $400.00 per acre.

As to school district 25, which lies immediately north of the

city and crossed by the I. & G. N., H. E. & W. T., B. S. L. & W., and T. & N. O., with the town of Cross Timbers on it, this is sandy soil with some reasonably heavy soil, partly wooded. The soil is of second rate quality, and values dependent in the southern part upon the proximity to the city. The Harris and Wilson Surveys, crossed by the T. & N. O., are assessed in the neighborhood of $40.00 to $50.00 per acre, worth in 1915 about $75.00 per acre. Capt. Hutcheson has 1,000 acres which is not assessed that high. The witness was trying to take an average. North of Brook Smith, beginning at Little York, land in the district is assessed at $10.00 per acre, and at $10.00 to $15.00 per acre around Little York. Around Brook Smith some acreage was assessed at $350.00 per acre; all of the northern part of school district No. 1 practically assessed at $10.00 per acre. Taking the school district, there is 300 acres owned by the First National Bank assessed at $150.00, worth between $300.00 and $350.00 per acre. There is no completely worked out system of assessment for this school district, because it adjoins the city.

Going to school district 26, adjoining Houston Heights and Brunner, the witness said that there was a school district basis for the assessment of $10.00 per acre except the land on the *the* Rineman and Morton Surveys adjoining Houston Heights; that this land assessed at $10.00 per acre in 1915, was worth about $35.00 per acre; that it was sandy, light soil. As to the Morton and Rineman Surveys, he said that they were pretty badly cut up and assessed on different bases, the Rineman at about $35.00 to $40.00 per acre, it being worth about $125.00 per acre.

As to school district 27 which adjoins Brunner on the west, the witness said that the Commissioners' Court and Assessor's office had reduced that to a basis, assessing it at not over $12.00 per acre on the average. Some was assessed at $6.00 and some at $20.00;
329 that the $20.00 acre assessments were worth in 1915 about $75.00, the land west of M. K. & T. worth about $35.00 or $40.00 per acre.

The witness was questioned as to the Humble district, the oil field district, being school district No. 28, in the northern part of the county, and said that the land was low, the northern part of it covered with timber and in general poor land, and included a portion of the oil field; that the oil field had been running ten or eleven years; that the differences were very great in values, special values varied tremendously, on the Stevenson there were the biggest wells and the assessment at $10.00 per acre; that the oil field was about six miles long from east to west; the witness said that he did not mean to say that all the Stevenson Survey was assessed at $10.00 per acre but half of it. There were acre lots assessed anywhere from $10.00 to $50.00 per acre. The witness was asked what this land was worth, and over objections stated that he didn't know what it was worth for oil purposes, could only state as to farming lands. As to the land North of the San Jacinto River in this school district, there were a few farmers, a very few farmers. The land was assessed at $6.00 to $7.00 per acre, and leaving out any values on account of proximity to the oil field, the witness estimated it to have been worth $15.00 per acre. It was poor farming land. As to the Dunman Survey in the oil

field, it was assessed at from $10.00 to $500.00 per acre, according to the conscience of the man who comes in to render.

Going to school district 29, the witness stated that it is timbered in part with more or less sandy soil; that the land was assessed at from $6.00 to $15.00 per acre, and was worth $30.00 to $35.00 per acre.

School district 30 lies in the northeast corner of the county, next to Liberty County. There are a few farmers in it. There is considerable timber, and the soil is sandy. It is assessed at $5.00 per acre, and worth from $8.00 to $10.00 per acre in 1910. This
330 testimony was given over objections by the defendants.

As to school district 31, crossed by the I. & G. N. Ft. Worth Division and the T. & B. V., next to Montgomery County, the witness said that he considered the average value of the land therein in 1915 at $17.50 per acre about, that it was of sandy, second rate quality, with quite a sprinkling of farmers, and assessed at $5.00 to $6.00 per acre for the land and $10.00 per acre for the out-lots around Tomball, which were worth about $25.00 to $35.00 per acre. Tomball is a village.

School district 32 is crossed by the T. & N. O. Railroad and lies west of the San Jacinto River. It is largely wooded, sandy soil of second rate quality, and assessed on a system from $7.00 to $8.00 per acre, and estimated to be worth of the average value in 1915 about $15.00 per acre.

School district 33, crossed by the H. & T. C. Railroad, is in the northwestern part of the county next to Montgomery and Waller Counties, of heavy sand, good second rate, pretty fair land, assessed on a system in 1915 at $6.00 and $7.00 per acre, unless a man sent in his rendition at over $7.00 per acre. The average assessed value was about $6.00 per acre, and a conservative valuation in 1915 and actual value $17.50 per acre.

School district No. 34 lies south of the T. & N. Railway on Green's Bayou. The highest assessment the witness said was about $40.00 per acre, and run not over $50.00. This district barely adjoins the city. The lowest assessment was about $10.00 per acre. The land lying closer to the city was worth $150.00 to $200 per acre. Going to the east the land was assessed at $10.00 to $25.00 per acre. The land that was assessed at $40.00 to $50.00 per acre and close to the city was worth $150.00 to $200.00 per acre about.

As to school district 35, the witness said that this lies south of the Humble district and some oil prospecting on it. Apart from
331 the oil proposition the land was taken for assessment at $10.00 per acre, and the witness considered the land worth on an average apart from any oil values, about $17.50 per acre. Part of the Stevenson Survey runs into this district and some of the oil wells are on it in this district.

As to school district 36, southwest of the city and shown on the map next to Brazoria County, the witness said it was assessed in 1915 on a scheme at $15.00 to $20.00 per acre, and that the fair market price for it in 1915 would average $35.00 to $40.00 per acre.

As to school district 37, the witness said it lies next to Waller

County, and is crossed by the H. & T. C. Railroad, and is of a dark sandy soil, fair, average second rate quality land, assessed at $7.00 to $8.00 per acre, and was of a fair value in 1915 of $17.50 per acre.

As to school district 38 on San Jacinto Bay, the witness said that the land was partly wooded, partly prairie, sandy and swampy. The Goose Creek oil field is partly in it. It was assessed in 1915 from $7.00 to $10.00 per acre, not many farmers in it. Eliminating the land supposed to have some oil value, it was probably worth $25.00 to $35.00 per acre.

School district 39 lies in the north part of the county near Tomball, adjoining Montgomery County. It is mostly prairie, some timber, some German farmers. It was assessed at $5.00 to $6.00 per acre on a scheme in 1915. The average value about $15.00 per acre.

School district 40 is on the G. H. & S. A. Railway toward La Porte and has a heavy soil. It was assessed in 1915 at $25.00 to $30.00 per acre. The lands were worth with Bayou frontage in 1915 about $100.00 per acre.

School district 41 is next to Waller County, on the west side of the county. It has sandy soil, a little heavier on the south, mostly prairie. There was a scheme of assessment for 1915 and assessed on an average of $9.00 per acre, and was of the average value of about $25.00 to $30.00 per acre. It is better land than the land north of it.

332 School district 42 adjoins Waller and Ft. Bend Counties, immediately south of 41, with the M. K. & T. Railroad through it. Around Katy the soil is pretty good, it is mostly prairie. In 1915 on a petition of the citizens of Katy a very few pieces in proximity to Katy was assessed higher. They petitioned that the land be assessed at $12.50 to $50.00 per acre, according to the proximity to Katy. But the Commissioners raised the value from about $25.00 to some of the large lots right in Katy. The lots in Katy were assessed at about $25.00, or about $50.00 per acre, and right around Katy and in the country it was graded from $12.50 per acre up to $25.00 per acre for average land, until you got in Katy, where the out-lots were assessed at $50.00 per acre. The land was worth in 1915 about $37.50 per acre, not including Katy lots and town lots.

School district 43 lies on the G. H. & H. Railway, shown on the map, and includes Genoa. The Interurban and the shell roads to Galveston go through it. The land is of a heavy sandy loam, and it was assessed on the scheme of assessment for 1915 at from $15.00 to $25.00 per acre, and outside of the town of Genoa the land was worth about $50.00 per acre.

School district 44 has South Houston in it, the G. H. & H. Railway and Interurban crossing. On the scheme of assessment for 1915 it was assessed at $20.00 to $35.00 per acre. The land is a heavy sandy loam, good soil, and was of the average value of about $50.00 to $60.00 per acre.

School district 45 adjoins Brazoria County and is bounded on the south by Clear Creek, and is open prairie for the most part, with find black soil. There was a scheme for its assessment in 1915 followed

out, and it was assessed at about $15.00 to $20.00 per acre. The average assessment was about $22.50 per acre and the average values about $40.00 to $50.00 per acre.

School district 46 is in the west part of the county on the S. A. & A. P. Railroad, and contains some of the best soil in
333 Harris County. It is open prairie and has prosperous farming, and on the scheme for 1915 it was assessed at $15.00 per acre, and was of the fair market value of $40.00 to $60.00 per acre in 1915.

School District 47 adjoins Montgomery County and is crossed by the I. & G. N. Railway Ft. Worth Division. The soil is second rate, partly prairie, partly wooded, some farmers. It was assessed on a scheme in 1915 at $5.00 per acre and was of the market value then of $15.00 per acre on the average.

School district 48 is crossed by the Beaumont, Sour Lake & Western Railway, lying near Settegast and Dyersdale on Greens Bayou, and is of second rate quality, most of it cut over land. It was assessed on an average at about $10.00 to $12.00 per acre in 1915, and was of an average value of $30.00 to $35.00 per acre. It lies pretty close in to Houston.

School District 49 is crossed by the T. & B. V. Railway and lies north of the H. & T. C. Railway, as shown on the map. Its soil is of second rate quality, some prairie, some woods. It was assessed on a scheme in 1915 at from $6.00 to $8.00 per acre, and the land was then worth $20.00 to $25.00 per acre.

The above completes the list of numbered districts.

The La Porte district includes the town of La Porte, and fronts on Buffalo Bayou and San Jacinto Bay. The lands are fine black and sandy lands, wooded on the bay front, west of the G. H. & S. A. Railway and south of it. There was a scheme for the assessment of lands in 1915, carried through, to assess them at $15.00 to $20.00 per acre, that is, except out-lots, which were assessed at $25.00 per acre. These lands west and south of the railway were then worth about $50.00 per acre. They lie in a drainage district. The lands north of the railway along the bay front were assessed at about $50.00 per acre and worth about $200.00. The balance of the land north of the railway was assessed at $15.00 to $20.00 per acre and worth about $50.00 on the Brinson Survey. The witness did not testify
334 as to values and assessments in the town of La Porte, except as to the out-lots, which he said were assessed at $20.00 to $25.00 per acre and worth $50.00 to $60.00 per acre. As to the William Harris Survey east of the railroad outside of the town, he said that the attempt was to assess it at about $30.00 per acre, including the water front, but that some of it was assessed at a higher rate, but that the water front was assessed at about $30.00 per acre and worth about $200.00 per acre, that back of the water front the land on the Harris Survey was worth about $50.00 per acre.

As to the Pasadena school district, fronting on Buffalo Bayou on the G. H. & S. A. Railway to La Porte, and shown on the map, the witness said that the land therein was good black sandy loam, mostly prairie; that the whole school district outside of the town was as-

sessed at $30.00 to $40.00 per acre, but that it ought to be worth about $100.00 per acre.

As to the Spring school district, situated next to Montgomery County on the I. & G. N. Railway, the witness said that it was mostly open prairie land, partly timbered, soil second rate sandy quality, and that outside of the town of Spring it was assessed in 1915 at $5.00 and $6.00 per acre, and was worth $15.00 to $20.00 per acre.

As to horned cattle, the bovine tribe, the witness said they were assessed in 1915 at $8.00 per head and that this has been done ever since 1908.

As to bank stock, the witness said that he had obtained the assessment of bank stocks for 1915 from the Assessor's rolls; that the First National Bank was assessed at $1,680,700.00 and taxed thereon as a total including real estate; that the bank makes its total rendition for shareholders and all, listing the names of the shareholders and the number of shares, and also gives a list of its real estate; that in effect the bank makes a rendition of everything the bank owns.

The plaintiffs in connection with the witness' testimony
335 introduced from the previously proved Sherwood & King's market quotations, quotations of First National Bank stock February 1st, 1915, bid 180, asked 190, and showed that that bank had 20,000 shares of $100.00 par, which at 180 the witness stated would have a value of $3,600,000.00, the bank being assessed at $1,680,700.00. The First National Bank is of Houston, Texas.

The witness was asked for the assessment of the Lumberman's National Bank and stated that it had 6,000 shares at the par value of $100.00. The plaintiffs in this connection then showed from Sherwood & King's previously proved market quotations, that on February 1st, 1915, the market bid therefor was 160, asked 168, and proved by the witness Heiser that it was assessed at $762,000.00, and that its market value on the quotations was $960,000.00.

The above two mentioned banks were both institutions of Houston, Texas.

The witness was then asked as to the assessment of the Houston National Exchange Bank of Houston, Texas, and said that it had 4,000 shares, par value $100.00. The plaintiffs then showed in this connection from Sherwood & King's market quotations, heretofore proved, that on February 1st, 1915, the market bid was $205.00 per share. The witness was asked what its total assessment was for 1915, and stated that it was $367,100.00.

The witness was next asked in regard to the assessment of the National Bank of Commerce of Houston, Texas, and stated that it had 5,000 shares, par $100.00, and was assessed in 1915 at a total assessment of $362,000.00. It was shown from Sherwood & King's last mentioned quotations that there was bid therefor 84 per share, and asked therefor 88 per share.

The witness was next asked as to the assessment of the South Texas Commercial National Bank of Houston, Texas, and stated that it had 10,000 shares of the par value of $100.00, and in this connection it was shown from Sherwood & King's last mentioned

quotations that there was bid therefor 280 per share, and
336 asked 285 per share February 1st, 1915. The witness stated that this bank was assessed in 1915 at $1,460,000.00.

The witness was next asked as to the assessment of the Union National Bank of Houston, Texas, and stated that that bank had been assessed at $1,017,850.00, and that it had 10,000 shares of stock, $100.00 par value, and showed from Sherwood & King's last mentioned market list there was bid therefor February 1st, 1915, $170.00 per share, asked $183.00 per share.

The witness was next asked as to the Guaranty State Bank of Houston, Texas, having a capital stock of 200 shares, $100.00 par value each. It was shown by said quotations that there had been bid therefor February 1st, 1915, $90.00 per share. The witness testified that this bank was assessed at the total amount of $15,000.00.

As to the Bankers Trust Company of Houston, Texas, it was shown that it had capital stock 20,000 shares, par $100.00 per share, market value bid on said quotations February 1st, 1915, $113.00 per share. Counsel for the plaintiffs said that it appeared that the Bankers Trust Company had real estate to a great extent outside of Harris County, and that he would leave out the consideration of this bank, but it was shown that it was assessed at $728,075.00 in Harris County, its capitalization being $2,000,000.00.

Next the witness testified to the assessment of the Fidelity Trust Company of Houston, Texas, that it was assessed at $101,000.00, and had 1,000 shares of the par value of $100.00. The market value thereof was shown by said quotations to have been February 1st, 1915, $175.00 per share.

The witness next testified that the Security Trust Company of Houston, Texas, was assessed at $100,000.00 in 1915, and it was shown that it had 2,500 shares of stock, par $100.00, market value from the quotations referred to February 1st, 1915, was bid 40, asked 55.

It was next shown that the Southern Trust Company of
337 Houston, Texas, had capital stock of 8,000 shares, par $100.00 per share, and that the market value thereof on said quotations February 1st, 1915, was $140.00 per share, and that it was assessed at $739,000.00 for 1915.

It was shown that the Commonwealth Trust Company and the Humble State Bank were assessed for 1915 at $45,000.00 and $14,000.00 respectively.

Sherwood & King's quotations for February 1st, 1915, were then introduced, but the essence of them *have* been set out above in connection with each institution as far as they show quotations of stock thereof.

The plaintiffs introduced Sherwood & King's previously proved quotations for March 1st, 1916, which showed as follows in connection with the mentioned institutions, that is the amounts bid and asked per share:

Bankers Trust Company	Bid	100	Asked	103
Fidelity Trust Company	"	250	"	...
First National Bank	"	180		...
Guaranty State Bank	"	125	"	150
Houston National Exchange Bank	"	220		...
Lumberman's National Bank	"	155	"	175
National Bank of Commerce	"	88	"	92
South Texas Commercial Natl. Bank	"	280	"	295
Southern Trust Company	"	140	"	150
State Bank & Trust Company	"	100	"	110
Union National Bank	"	170	"	175

The witness Heiser next stated that the County assessments on property in the city south of Buffalo Bayou were made by comparison with the city assessments in 1910, and by adding 25 per cent to these assessments, and that this was done for some little city property north of the Bayou, and that with the exception of where big improvements had been made this system had been carried forward on the County Assessor's books to date.

338 Cross-examination of the witness Heiser by defendants: The witness stated that the Assessor's office had added uniformly 25 per cent to all of the property on the south side of the Bayou in 1908, and that from 1908 to the present time it remained unchanged unless for some additional work on the I. & G. N. of ballasting, and that other property in the City of Houston south of Buffalo Bayou was assessed 25 per cent higher than the railroad property there, "if the Commissioners looked at it that way they wanted to equalize it."

That there were from 42,000 to 45,000 assessments in the County, and that the witness had read a very few of them in preparation for his testimony, but that he had gone to the abstract book and seen whether there were any changes in the assessments and examined approximately between fifty and one hundred pieces of property out of forty to forty-five thousand, and based his testimony upon this examination and upon the determination of the fact that the principle formerly pursued when he was chief deputy in the office was carried forward, that his examination was to determine whether or not the principle had been changed; that he had looked at from fifty to one-hundred renditions of pieces of property, which was an entirely different thing from the taking and posting of it in the abstract; that as to these in the abstract he supposed that he examined 200 to 300, but as to the remainder of the 45,000 renditions it is not the fact that he did not know anything about them; that he did know from his own personal knowledge, to wit: take the rendition at random of any school district, locate that in its survey, and then go to the survey and see whether the same system obtained that obtained in the prior year, and that would prove not only that rendition but all in that survey and adjoining surveys in the school district, unless it be assumed that the Assessor would give one man a $5.00 rate and put $25.00 on another, which he did not know was

done; that it was a possibility that with the exception of these two to three hundred entries the other assessments were not made on the average as stated by the witness. The witness then said that
339 he would take abstract 621 of the Perkins Survey, Abstract 1601 of the Santa Fe Survey No. 1, that he went through that to see what the most prosperous farmer in the school district was assessing his land at, and found $5.00 per acre in school district 30, but that he did not know that he could name any other assessment in that school district which he examined; that he had been in that school district in 1911 or 1912, probably one or two years before, on a campaigning expedition, not inspecting the land, but that he did know something about what the land was worth from his own personal knowledge, from experience, as he had pieces up there for sale, he thought two, but that he had not made the sales and knew of no sales of his own knowledge in that district, but that he had made no effort to sell the property as listed with him about three months ago, because there were corrections to be made in the title; he had made an offer to sell and wanted to straighten these matters out, but that he had no bid for these tracts and knew of no demand for these tracts; that everything had a value; there is a distinction between market value and value—market value could only be sworn to when there was a market, but that there was no sale value of these particular tracts, and that by market value he, witness, understood the reasonable fair value of the thing that was sold and offered for sale, not under the hammer or foreclosure; the price it really ought to bring; that his answers on direct examination had been based on this theory of market value. As to the number of tracts of land listed with him in the county for sale since he had left the Assessor's office in the fall of 1914, the witness said he could not state, that he had more listed with him to check up and straighten out the assessments than incidentally for sale.

Some of the people in school district 30 used their land for farming, but very little of it is in cultivation. The balance is used for grazing. The witness said that he did not know how much land it took to feed a cow; that he had seen the crops but did
340 not know how much the land produced an acre; that as to what revenue the land would produce, the fact that a man did not know how many bushels of corn it would produce would not lead him to infer that he knew anything about the land; that the last time he had been out in that school district he was campaigning. That there are about as few farms in school district 30 as any; that he had given a very conservative estimate of the value of the land derived from the concensus of opinion, and as to school district 30 only by general conversation, questions about the crops and how people were getting along there, to which probably the witness said he didn't pay much attention as to that school district, but that he was not making wild guesses and knew enough to back up his judgment, and he thought there was a market value for land in school district 30; that he might find a demand therefor, which could be created, but you had to go after people, that they rarely came to you; that a person who had referred to him land

in this school district he had referred to a lawyer to straighten out his title; that he had known of no land outside of these two tracts offered for sale in school district 30.

(At this point motion was made by the defendants to strike out Mr. Blake's testimony, which was overruled by the court.)

Cross-examination of the witness Heiser continued by the defendants:

The witness said that the best of his recollection is that the Board of Equalization left it to the Assessors in 1908 or 1910 to take such pieces of property south of the city and adjoining the city and add 25 per cent to the previous assessments of what would be fair, including that in the city south of the Bayou, and that generally 25 per cent on the previous assessments was added to this property and some on the north, that is 25 per cent of the previous assessment in 1908 of the city assessments thereof.

That the I. & G. N. Railway is assessed at $40,000 to $45,000 per mile in school district 20, or something like that, that
341 is the Oak Lawn line, running from the foot of San Jacinto Street down through the city into the school district to the east line of the Harris Survey, north of Harrisburg, going beyond the Turning Basin; and included in this assessment of $40,000 to $45,000 per mile was 90 to 110 acres owned by the I. & G. N. on the Bayou, assessed as part of the right-of-way. That there is now no school district 21, that it has been absorbed in 1915; and that in school district 21, nearer to the city, the witness thought the assessment was $40,000 to $45,000 per mile, and in school district 20, $30,000 per mile; but that he did not particularly know, this was the best of his recollection. School district 20 at that time (now included in 21) began on the west line of the Harris and the east line of the Williams; that he judged in school district 20, as it stood before 1915, there was possibly a mile of the I. & G. N. railroad or three-fourths; that on his direct examination he said nothing about the $30,000 per mile valuation, but that he estimated the assessment at $40,000 to $45,000 per mile; that he had made an investigation of the assessment records, but that on direct examination he had stated, as he then said, only his off-hand recollection on that, but has refreshed his recollection on this matter and corrects his previous statement as above; and that he only now states that property was assessed at between $30,000 and $40,000 per mile for a mile and a half; that he had examined from 200 to 300 assessments in 1915 and thought there were at least 40,000 assessments, and had testified to the general values for assessment throughout the county, not to the various parcels in general, and to the values that were taken in the separate school districts; but that as to those outside of the 200 or 300 assessments examined by him he was not making a mere guess, he was acting on the experience of ten years of active service, and that he offered his testimony as an opinion based on the fact that he had had an experience in this Assessor's office, and so offered it as a lawyer would his opinion; that if the property which he said was

assessed at $40,000 to $45,000 per mile was only assessed at
342 $32,500 per mile, then he had made a mistake, but that he did not admit that on 40,000 assessments he had made a similar mistake; that he had testified that this I. & G. N. land on the Bayou front was worth about $3,000.00 per acre, and that he could state what it was assessed at in 1914.

That he could not say how often in his life he had been in school district No. 1; that last August or September he had been there and inspected land, 366 acres; that he investigated land in that district probably ten or twelve times, and scoured through that country representing a client.

That it would be hard to estimate the number of acres in rural school districts under cultivation, but on an estimate in school district No. 1 he would say about one-half, but that he considered the land in this school district second rate soil that they raised potatoes, corn and possibly a little cotton; that he did not know what amount the land would produce in crops in this district, as he never made any inquiry, and did not know what it was worth after production; that he knew of no sales in school district 1 in 1915, the records showed a number; that he had sold a piece of land in school district 1, that a piece of land had been taken up and purchased from the State.

In School district 2 he had known of a sale in 1914 for $35.00 per acre for 38 acres. It was perhaps in the southern part of 47 or the northern part of No. 2; that he knew of no other actual sales up there; the land is of second rate quality, German farmers, pretty well populated.

In school district No. 3 the witness said he knew of no sales. The land is of same character as No. 2; that he could not state the value to the people holding it from a productive standpoint. It is considered amongst the farmers reasonably good land and held by them for homes. Such people expect to get a better price if they sell than is ordinarly obtained, on a sentimental basis.

343 As to school district 47, the witness said he knew of no sales; it produced about the same as school district 2, perhaps not quite as good.

The witness said he knew nothing about sales in school district 9 nor 31, but corrected this by saying that there were sales of outlots in Tomball, but that he did not pay any attention to it or to the prices, because he was not interested; that he knew of no sales in school district No. 39 or No. 5, both are good farming land, producing potatoes, corn and cotton, that he had passed through them time and again, the last time possibly a year and a half ago. That he knew of no sales in No. 12, that he had been in the district, that he had never been up there on a land inspection trip. As to No. 36, he had been there and inspected the land, but knew of no sales within the last few years. It is better productive soil than some of the others, with a little heavier black land.

As to No. 7, he had been there, not to inspect the land, that he had two pieces for sale, one in one district and one in another up there, but that most of the people wanted so much for the land it

was hardly worth trying to sell; that he had half a cabinet full of files on land offered for sale in Harris County, all of which he had located and obtained prices on; that he might be able to sell them at better times, but that he would not try to sell them at these prices now unless in case of decided bargains; that he had a particular piece which he had in mind listed in No. 33 since the first of the year.

As to school district 11, that he had not inspected the land there and knew of no sales, did not know what it produced; and the same answers applied to school district 41, he knew that some sales were made there on statements of other persons, but paid no attention to it after it was sold. As to school district 2, he had testified as to a sale in it or in No. 1. That he had never been to school district No. 6 to inspect lands, but knew of quite a number of sales in them.

Houston Hot Wells are there; that this was a lot proposition;
344 there was a sale outside of that he knew of, but there were no sales in 1915. He estimated the value of the land in it at $17.50 to $20.00 per acre, to his best judgment. It was stated to the witness that he had testified that it was worth $20.00 to $25.00 per acre, and was asked why he had changed his opinion. He stated that the Hot Wells were in there; that the farm lands on some of these surveys he thought he said were worth $17.50 to $20.00 per acre, and after looking back to his notes he said he had testified that they are worth $17.50 per acre, but that the Moody Survey he did not think was worth $12.50. The questioner stated that the witness had testified they were worth $20.00 to $25.00 per acre. The witness said his memorandum was $17.50 outside of the farm lands. The questioner said that he said nothing about the $17.50 in the previous testimony. The witness said that he remembered in his direct testimony he had been asked to exclude the town-lot proposition, but did not remember whether the town-lot proposition was gone back to; that he considered these Hot Well lots merely of speculative value.

Northeast of the station of Cypress on the H. & T. C. Railroad and in that vicinity the land was thought by the witness to be of the average market value of $17.50. Witness stated that he did not know what the property around the Hot Wells was selling at, but had heard that some land had been sold $100.00 to $150.00 per acre, and some at $50.00 per lot, but the soil was no better than the average of that in No. 6. People dug there for oil and got a hot well, have a sanitarium and have been selling out-lots. The land is assessed at $6.00 to $8.00 per acre. One tract which sold for $15.62 per acre was assessed at $9.37. The Assessor made an error as to this tract, a new man, a non-resident was involved. The exceptions in the system were not followed out, which does not show that the system or rule was not in existence. It is possible that a man might come in and insist upon a higher assessment, as

$10.00. The witness could not say that he examined any
345 more assessments in this district than in the others.

The witness stated that he knew of his own knowledge that the system in use is in use today; that the renditions are given out to the local assessor, and made and copied from the renditions

of the previous year at $6.00 per acre, except in a few cases at $8.00. The counsel for defendants objected to this statement and stated that they desired a statement to be made from actual inspection, and then asked the witness what he had to say from "actual inspection of the record or otherwise," that is whether or not so informing himself this land may have been assessed higher. The witness answered: "Now you say 'or otherwise.'" Then the question was confined by the questioner to the record, and the witness was requested to answer so far as he knew from inspection of the record, that is its absolute inspection, and he answered: "No, sir; I only know that from a bunch of them in here; that is all"; that he could not say how many he had inspected, probably 50 or 60 or 100; where he found a non-resident, one of his clients was assessed too high, he got the average. That he had testified yesterday that in preparation for this testimony he had examined 200 to 300 assessments in the whole county, but that in 1915 in school district 6, representing clients in regard to assessments, he had possibly made 50 inspections of assessed values therein, but that he could not say how many he had actually examined.

The witness said he knew of no sales in school district 42, except that he knew of sales made at Katy without knowing the particulars thereof; that he noted the transfers, but if he was not particularly interested he passed it up; that they were mostly lots in Katy if he recalled correctly. He did not recall any acreage sales and did not know what it was actually bringing in 1915; nor how many bushels of corn to the acre or potatoes he could state *what* it produced, but one who expected little in these drouths and storms was not disappointed; that he did not know what the land was
346 worth to the man who was holding it and the returns per annum.

Off-hand he did not know of any sales in district 10, of which the southern part is more fertile than the northern part, nor what it was worth for the purposes for which it was used, leaving out of consideration market value. He made the same remarks in regard to district 46. Asked what revenue land brought in that district, he said pretty good revenue, that the people were all pretty well fixed in it.

As to district 27, witness said he knew of no sales in it. He made the same statement about the real value that he did for the others; and so as to district 49 and district 8 he did not know of sales in them.

As to the Spring district, he knew of sales of town lots; outside of lots there was one acreage sale a couple of *days* back in 1916, none that he could recall in 1915; nor did he know what these lands were worth in 49, 8 and the Spring district to a man holding them for the purposes for which they were used; and he made the same statements as to districts 29, 28 and 35, leaving out the oil proposition as to 35, also as to districts 37, 17, 15, 38 and 16, answering as to 1915 except that he recalled in a general way, two sales in 16 in 1915, Cullinan had bought 1,600 acres and the Texas Company 800 acres, not an oil proposition, in 16 east of Clinton.

As to sales in district 34, the Farmers Company bought some land there for sites for oil tanks, an oil tank farm. As to 48, that he knew of sales being made there in the La Porte district, but knew only of sales of lots in an addition; that the land on the McKinstry Survey was very good, worth about $50.00 per acre on the average; that none of it was selling at bona fide sales at $6.00 to $7.00 per acre, just as the witness said he knew the Stewart Building would not sell for four bits.

As to district 13, the witness said he could recall no sales off-hand, but in District 19 some little light sales in Webster, town
347 lots, but outside of Webster a few other sales in 1915, some acreage on Clear Creek.

As to district 43, the witness recalled no sales. As to the Pasadena district, he knew some had taken place, but did not know the particulars or terms. In district 44 he knew of sales but had not particularly kept up with the prices, they were consummation of contracts probably made four years ago. He had noticed the consideration in a good many of these contract sales, they were in monthly payment propositions regardless of the value they paid, and the witness did not consider them standards. The witness testified that he tried to keep up with the accounts of sales in the papers.

The witness recalled no sales in district 45, but in district 36, which was mostly cut up into ten acre tracts, quite a number of them appeared in the daily transfers but the witness was not particularly interested in them because they were not cash transactions.

In districts 22 and 4 the witness recollected one sale of acreage property out of the Rose Survey, and also in district 4 sale to the City by the Herman Estate. He could recall no sales in district 24, but there had been some he thought, town-lot propositions, that the Johnson farm was sold last year. As to district 20, he said that he knew of no sales of which he knew the terms, but that there were sales in 20 of some lots, he had sold some of them himself, but they were lots not acres—he understood the question to apply to acres; that he knew of the sale of the Rick acreage and the City of Houston purchasing it, in district 20.

As to district 25 he practically knew of no sales, that is land sales, there than lot sales and had no particular information of the lot sales.

As to the Brunner school district, the witness said he knew of one sale from Sweibert to Neuhaus, but that he thought that was nearly all in district 26; that he knew of lot sales in the Brunner
348 Addition, sold one himself, and in the Rice Military, Cottage Grove, Conklin, Stokes and Dodge Additions; in these cheap additions the consideration named in the deed does not give much information. Asked generally as to other sales in district 26, he said he knew of one but not the particulars.

The witness said that some of the additions or subdivisions around Houston were sold at $5.00 down and $5.00 per month, practically all of the outlying additions, and in addition to those mentioned above there were the following additions in which property could be

bought on this installment plan: Roseland, Southside, North Houston, probably Sunset Heights, Independence Heights, various additions that surround Independence Heights; Rice Military, the witness thought in H[illegible]n Harbor also, Magnolia Park, Central Part, Southland, South [illegible] Terrace, Kensington and Southland Annex; on the Tierwaster Survey, Brookline, Park Place, Smith Gibbons Addition, Smith Addition, Smith F[illegible]ure Addition, Fidelity Addition in the Thomas, and that there [illegible]t be others, and that this same plan would apply to places furth[illegible]way, town-lot propositions, to-wit, R[illegible]n, North Houston, and did apply to South Houston. That when he saw sales of these lots at these places, it signified that the contract had been made in 1912 or 1913, that the people had been paying in small payments or that they had been paying the consideration.

As to how much property the I. & G. N. Railway had below the Turning Basin, the witness said that it used to have 90 or 96 acres, something like that, that he thought the northern part of it would come up near the new channel and the southern part hit the old channel; that this 90 or 96 acres is a long strip, reasonably narrow, running from cotton warehouses up to the platted part of the Turning Basin Development Company, or north of Weld & Neville's property. Off-hand the witness said he would say that all of this 90 or 96 acres of the I. & G. N. was not on the new channel but thought a part of it was, but he might be mistaken in
349 his statements in that regard. He thought the southern part was on the old channel, but he thought that both the old and new channel was used. The new channel was cut off; that the existence of the ship channel and the turning basin was the main thing that gives the land in that locality its high value; that it varied according to its location, and that the frontage on the channel was one of the things that gave it value, and that a tract on the channel would certainly be more valuable than a tract back of it not on the channel, but rail facilities and many considerations would have to be considered.

That he thought other people would have to get across the I. & G. N. track down on the water front at this place, but that he didn't know as to the rights of way over the streets.

That he estimated this I. & G. N. tract of 90 to 96 acres worth about $3,000.00 to $3,500.00 per acre, but the right of way outside of this tract would be worth less.

The witness stated that the lots in Magnolia Park on German Street were worth $60.00, on Harrisburg Road $125.00, and the balance about $50.00. They were 25 foot lots.

The witness said that he had no definite knowledge about the value of the lands in the various school districts of the County to the men who own them for the purposes for which they are used; that he knew their relative producing capacities and how much cotton they can raise to the acre if not drowned out, but how much on an average for ten years the witness said he did not know.

The witness Heiser was re-examined by the plaintiffs and stated he was not in the Assessor's office in 1915, that before that time he

practically handled all of the assessments for ten years, that he had to levy the assessments in compliance with the system adopted in Harris County; that the taxes for the County, and the rolls, the tax rate for the year appeared on the bottom of the sheet; and that it was his duty to handle every sheet, and that every sheet
350 for ten years was handled by him before 1915.

The witness Heiser was again cross examined by the defendants and stated that no school district or drainage district or sub-division taxes were levied on the intangible values in Harris County, but there were road taxes, which were thrown in in bulk, no special taxes.

The defendants then moved to strike out Mr. Heiser's testimony, which motion was overruled.

351 (23) H. G. LIDSTONE was called by the plaintiff and testified:

Witness stated that he had been subpœnaed and came under the process of a subpœna and not as a voluntary witness, and that he is now employed in the County Assessor's office and as follows:

Before that he had been in the City office with Pastoriza to install the Summer system in the City and had remained in the City office four years, prior to which time he had been in the real estate business thirty-five to forty years here in Houston, Texas.

That he was now employed in the City Assessor's Office in making up a book of values of the City of Houston, showing in connection with each valuation the actual assessment and showing the assessments for 1915, and values for that year. The witness testified that this is being done partially on the Summer system, but that he uses a different corner influence, that is, a different ratio of percentage for corner influence.

The Summer system is simply an equalization of property by the front foot rule or unit, and the unit is placed there by people who own adjacent property. They say what a middle lot is worth—"we figure it out after they tell us what the front foot is worth—they say what the middle lot is worth and we work to the corners." That the work out to the corners is made on a percentage basis, not considering the number of people. For instance, a middle lot is taken which may sell for $5,000.00 50 foot frontage 100 back, that would be $100.00 a front foot. The attempt is to get a conservative market value. If a party said that the lot was worth $100.00 a front foot and the whole neighborhood concurred, the witness said the chances are that he would put it down at about $90.00 and that his effort was to get a fair market value conservatively stated. The witness said that he also took into consideration sales and transactions and followed them, and that in making up these books for the county on which he is at work, he was using the city books
352 partially and sometimes to get buildings, the City having a building inspector who noted all the buildings from the building permits.

The witness said that he had finished nearly all of the South side of the city South of the Bayou and on the North side, the Allen

Addition, that he worked at this between times, as he also took assessments. The witness had with him the results of his work which he called adjustment tabulations and stated that his work was done block by block and was intended ultimately to be complete of the whole city, and that this book showed as to each parcel, the land value, the improved value, the total value and the assessed value and also the percentage worked out of the assessed value to the true or market value, and that the object of the book which he was making up, which he called "adjustment tabulations" was to get a basis of tax values. At this point an objection was made, which, being overruled, the witness proceeded and testified:

That the present assessments are unequal and the ratio of percentages will show the inequalities which exist and that in the book which he is making up by blocks, he takes the property of each owner and each block separately and states under the first head which is land, the unimproved value of the land, under the next head the improved value of the land, then the total value, then under the fourth head, the assessed value, and then finally the ratio between the assessed and true value or per cent, and that this is made out upon the basis of conservative market value and then finally are stated the changes necessary in order to equalize the valuations, and also that there is a calculation of the average ratio between true and real values for the block, and that this system was reflected in the book or books which he was making up. North of the Bayou his work had only covered the Allen Addition, and South of the Bayou the 670 blocks, with the exception of about 100 blocks; that he had completed over 500 blocks South of the Bayou, and these 100 blocks were beyond the Aransas Pass Railway territory in the extreme South end of the city, and that his incompleted work
353 was in this extreme South end, not the choicest residence section, being beyond the Aransas Pass Railway territory.

The witness did not mean to state that he had completed, with the exception stated, all of the present area South of the Bayou, but that he had completed the 670 blocks, with the exception stated, South of the Bayou, which constituted the city exclusive of the additions.

He further testified that the City of Houston is bisected by Buffalo Bayou and that the main business portion of the city is on the South side along Main Street from Congress to Texas Avenue, and that his work covered this Main Street business property.

The witness was asked to take his book and turn to the tables covering the Main Street business property. He said that the Kiam block on Main Street works out that the proportion of assessment to conservative market valuation is 55 per cent—the separate parcels of that block vary.

Here again the defendants objected, the objections being overruled, over the defendants' exceptions the plaintiff testified that in that block he had a sale noting Joseph F. Meyers, $105,000.00; that he had valued that lot at $88,000.00 and that it was assessed at $47,000.00 odd. The witness said that he investigated these matters closely, that he was a professional valuer of real estate. The witness

was next asked to turn to the block on which Levy's store is on Main Street, block 32, and said that the assessed values of the block worked out 50% to the true values, that the corner of Congress and Main would occupy a $3,600.00 unit, with a $2,000.00 on the side; that his valuation of the Joseph F. Meyer property included the improvements.

The witness testified that the Main Street block in which the Scanlan Building is, No. 45, worked out a percentage of assessment to real value of 50%; that he had valued the Paul Building property at $198,000.00, and that it was sold, as noted in his book, late in 1914 for $200,000.00.

354 Returning to the Meyers purchase in the Kiam block, he thought that Meyers had paid something above the real value, having adjoining property with which he desired to consolidate his purchase.

The witness said that the South Texas Commercial National Bank on Main Street was in block 21, and that the ratio of assessments to value of 1915 of that block worked out 37%. That the Howe and Camp property in that block had been valued by him at $58,000.00 and was marked sold for $41,000.00, but the witness said that his valuation was not too high, that the purchaser had obtained a bargain.

The witness was next questioned in regard to block 23, not on Main Street but on San Jacinto and Congress Street, and stated that the ratio of that block, of assessments to true values was 60%. That he had valued the Mintz Brothers property therein at $64,725.00, and that it had sold for $77,000.00. That the ratio of assessments to true value runs higher in the business portion of the city than in the residence portion, and that taking it straight through, as far as his work had gone, and as close as he could it, the general proportion between assessments and valuations was 50%, but that this was an estimate which he thought was about right, that he had not worked it out as a whole, and that if the County Commissioners Court would let him figure on the true costs for the entire county and take 50% average for everything, they would have $160,000,000.00 on the books, and that the difference between land and city values is very extraordinary. That the outside land values run from 30% to 40% as the maximum of assessed values, but that the percentage is higher in the city, whereby the city is paying the greater proportion of the taxes and 78% of all the taxes of the county, which means that according to the tax rolls of the county 78% of the values are in the city.

Witness testified that the Tax Assessor's Office had a scheme, or principle or proportion of values which they try to reach in assessment. "We try to arrive at say two-thirds to 70%, or 66-2/3

355 to 70%. That heretofore if a man comes in with a $1,000.00 lot, the Assessor's office have been carrying what was found on the books and made no effort to change the party's assessment, except in the case of an extreme variance, and then we try not to wrangle with them at the desk, but send for them and call their attention, where there is a great discrepancy, and that otherwise the

valuations of Assessor Miller's term, (Miller being the predecessor of the present Assessor Moody) are carried forward, and that in the work he was undertaking they were trying after a while to get away from that, but that that lay in the future. That the effort of his work was to equalize the percentage for every body."

That the average was 50%, the county would be 30% to 40%, not more than 40%, that is, by the county, he meant outside of the city, and that the proportion between assessments and true values of the whole county, including the city, would be about 45%.

The witness stated that he had not followed the City's land valuations, that he was working on a unit system, but that the City's unit and the unit system which he is using are pretty nearly alike, and that the land values on the City's books, without regard to improvements, are about the same as the values in his books.

Over objections and exceptions of the defendants, the witness testified that the city was now taking about 50% of the value of the improvements in its assessments, and 80% of the value of the real estate. This was introduced by the plaintiffs as a predicate to showing the total assessments of the City, with the statement that it was expected to show that the city assessments were not too high.

The witness stated that his books and investigations were made up by him by investigation of each block. That he had been, as he had stated, long a real estate man in Houston and had been active in that business, and that his observations had extended to the County, as well as to the City, to the county somewhat, but more to
356 the city, that he had not reached the assessed values of the Boulevard in Houston Heights, but that he knew that they were somewhat higher than those in Houston.

That as he had stated, his completed work and tabulations included the 670 blocks of the old City of Houston South of the Bayou and all of it, except some South of the Aransas Pass Railroad, which was partly a negro section and less valuable.

As to the North side, that he had completed only the Allen Addition, which was a considerable section, including one of the nicest portions on the North side; that taking the whole city, he did not think that his work had covered 1/5 of it, but that 2/3 of the value was South of the Bayou; that when he said that he had completed, with the exception stated, South of the Bayou, he did not mean the whole area of the City, but blocks 1 to 685; that he had done the central part of the city South of the Bayou and not the subdivisions and additions, such as Fairview, Montrose, etc.

Cross-examined by Defendants:

The cross-examiner stated that he desired to take up a few entries at random on the books of the witness in order to illustrate his method. The witness was referred to enry Block 11 in Allen Addition, North side of Bayou in the name of Partin, and stated that that would be the name of the owner, and that he arrived at the values by using the unit system. This property was 50 by 100 feet, that it was valued at $1,705.00, 705 divided by 50 would give about

$15.00 a front foot, and that the house was valued at $1,000.00, that was what the builder's permit called for, making a total of $1,705.00. That as to the value of the unit of 705, it was arrived at by statements of the neighbors, what they thought the property was worth, the estimates of what they put on the value of their own lots in that vicinity. The witness stated that he had been all through the city; with respect to this particular piece of property he could not remember, but the units run about the same, they gravitate as they come towards a good paved street, or towards the City, but he
357 thought that he had valued this particular piece about six months ago, that he had not gone over each of these pieces of property, but that he takes a detailed map of the city, cut up into maps, and figures from the unit. If it was 50 by 100 the value would — $700.00. If it ran back 150 feet it would be plus 15%. A man next door might have 50 by 75 and then he would minimize the difference and his value would be 88% of the unit; that was his system and that it was as scientific as building a house.

As to whether or not he would take an owner's word for value, the witness answered that if everybody said they would sell lots in that vicinity for a certain value, that would establish it and that just before starting the unit system little gatherings were held all over the city four years ago and that the values have never been challenged, that he thus derived his opinion and worked out the units. It may be that something would happen in front of a piece of property which would increase the value of it, or depreciate it, but that the unit is never touched, a man alongside may have a gulley on his property and depreciation will be allowed, the engineer telling how much the filling would cost. The values were based on what the people said four or five years ago as to the units and that this method was generally followed and that the values represented the judgment of others as well as his own. When people would make a fictitious value, he would pay no attention to it, but whatever the neighbors agreed on would be the true value; that since the meetings were held about four years ago he kept track of the sales, that it was not necessary for him to go out and inspect the properties and that he had not, that the number of sales had been in small proportion as compared with the number of entries in his books. That it was not necessary, outside of the entries under the head of "Remarks" where he had entered sales, to go and supplement the work done on which the units were found, that the map takes care of itself and that it would be just like a man running up and down the right-of-way of a railroad and taking measurements which he had already, that he knew that his work was absolutely cor-
358 rect and that the values were absolutely correct just like the questioner knew his business.

That he read all the assessments of the county, about 47,000, and as to the county values he accepted what he found in sales because he caught the transfer every day and saw the record of the sales, and that outside of the city he relied entirely on this, what he read of the report of sales, that he read all the transfers, that they are placed on his desk every day, whether one to five hundred, he had

to take care of them, but that from personal inspection and personal investigation outside of these records he did not know anything about the values in the outlying precincts. Out on the Westheimer Road he knew land was sold out there at $100.00 an acre; that in School District 46 he knew land sells there for $85.00 per acre, it was assessed at $15.00. He knew this from talking to the people who owned the land and from deeds and transfers

As to School District 33 a sale in that took place yesterday at $30.00 per acre; that as to the 40 or 50 School Districts excluding that around the city, he had not gone to or looked at the land for the purposes of valuing, that he had been all over it, surveyed half of it or measured it, that he had been in School District 12 he supposed about three or four years ago and in all of that territory in the last four or five years, that he had had an interest in nearly all of School District 30 and had to go there. That the land out towards Dairy is productive and so of the land North of Crosby. Some of it is rice land, but as pasturage, considered as nothing. Humble falls in the same classification, ten years ago you could have bought it for $2.00 an acre, but had sold land in it for six bits an acre. As to the Humble district there were some margins, that he did not undertake to say how productive the lands of the counties were, that he *he* had made some observations from travelling around in them.

That the value of lands in Harris County today is the result
359 of a great boom some four years ago "I don't believe there is any land in Harris County really worth over $10.00 an acre, because the people in Harris County have not found out what it is good for yet; may be they can raise peanuts on it"

The witness said he knew the land around Brookshire was good land, fast coming in. Anybody will buy Harris County land; you can sell it; they will buy it on the fly; that it was worth more than from $6.00 to $10.00 an acre for grazing purposes, the uncultivated parts, that it took about seven acres to browse a cow, that figuring upon a rental standpoint he supposed that it would be $70.00 for a cow; the cow would bring 10% revenue, that all the taxpayers signed the statutory affidavit.

The witness, on further cross-examination, was asked about a certain deed and the date of the sale made in 1914, and whether or not the values fixed by him might be lower or higher than the named consideration therein. He answered that there was only one thing that could be disturbed, that is a depreciation on improvements, say of 2%; at the end of fifty years the improvements would fall down of their own motion.

The witness next testified on Re-Direct examination by plaintiffs as follows:

That he had entered the County Assessor's office in November, 1914, and that since that time had had reports of all the sales in the county put on his desk and that he kept track of them by a card system. That he did not make his estimates of the lands (but outside of the city they are assessed at about 40% of their true value) on these reports of sale, which would show a higher valuation than those taken in the Assessor's office at what it is worth; that if a man

would say a lot was worth $1,000.00 he would say it is worth $900.00.

At this point the defendants moved to strike out certain portions of the testimony of the witness Lidstone, which motion was overruled.

(24) T. B. Eastburn, called by the plaintiffs, on examination by them testified:

360 That he is in the real estate business, and has been in it since 1901, in Harris County; a member of the firm of L. Bryan & Company.

The witness was here handed a School District Map of the county marked "Exhibit 1" in the roll of Exhibit of maps hereto attached and made a part hereof.

The witness said that he had never paid any attention to the School Districts. It was stated to him that he be questioned on the School Districts so as to connect his testimony on the maps. The witness further stated that he fairly well kept under his observation the course of sales and market values in the county, that the land business was his business and that he had been trying to keep up with it. That his firm was the oldest one in the county, organized in 1890, when Mrs. Betty Bryan started it, and that being asked the question he was bound to say that it was the largest one in the county, that he had been actively engaged in that firm for fifteen years, that Mrs. Bryan was a lady of wealth, making her money in the real estate business.

Taking the Northwestern part of the county, the witness said that there were no market values in the City of Houston or anywhere else at present for anything; that he understood all market values, the market value of the land, of what it would bring on the market like a bale of cotton, or a bale of hay or a sack of potatoes, and that in that definition of market value he meant that there was none at this time. Ordinarily it has one; that he could answer what has been the value and that he could answer what price he had land for sale for, and that he could answer the price which he sold land for.

Over the objections and exceptions of the defendants the witness testified that considering every element, character of the soil, movement of population, prospects, and everything on or about the land in the northwestern part of the county; he considered its value in 1915 to have been from $15.00 to $35.00 an acre, according to location and *and* quality, worth more on the shell road than when

361 it is eight miles from it, and that this answer included everything from School District 16 to the northwestern part of the county.

Coming South of the H. & T. C. Ry. and South of School District 6 West of the City, the witness said the land was all open prairie with the exception of a little timber along Bear Creek and Cedar Bayou. As to School Districts 41, 42, 10, 27 and 43 the witness said that was a pretty wide scope of country, that in 1915 North of Buffalo Bayou it was worth from $15.00 to $25.00 an acre; South of the Bayou down to the Aransas Pass Railway, including Districts 10 and 46,

that is a small part of 10, that it was worth from $25.00 to $75.00 an acre.

School District 27 South of the Katy Railway and North of the Bayou up to Brunner, the witness considered to be $15.00 to $200.00 per acre, according to its proximity to the City. In the upper end, there was a lot of timber on the Bayou, not worth over $15.00. In School District 23, having Westmoreland Farms and Bellaire on it, the witness estimated the values to be in 1915 $75.00 to $500.00 per acre.

Taking School Districts 24, 45 and 36, and leaving out the Bayou front, and considering only the rural parts thereof, witness considered that on Clear Creek, bordering Brazoria County, No. 45 and 36 to be worth $20.00 per acre, and on Simms' Bayou $75.00 per acre, therefore ranging from $20.00 to $75.00.

Taking the region between School District 20, say from South Houston or Dumont down to Galveston County on Clear Creek, on the G. H. & H. and along the Interurban, and outside of towns and villages, the witness said it would be a very hard question to state the values; that within two miles of the Interurban on either side, they would range $75.00 to $100.00 per acre; beyond the two miles about $40.00 per acre. There are many exceptions where people are asking a great deal more, but that there were no sales being made.

That taking the section between the range of the Interurban and the G. H. & H. Railway, say two miles from it running along Clear Creek, Clear Lake and stretching over to the G. H. & S. A.
362 Railway, parts of School Districts 13, 40, 14, 19 and 43, the witness stated that in 1915 the true value would average about $35.00 per acre, and that going North of the G. H. & S. A. Railway from School District 20 down between the Railway to the Bayou, including the Bayou would say that it would average about $2,000.00 per acre, that is, *on* school District 20, as the witness understood he had been asked between Harrisburg and the Bayou. It was explained to the witness that he was not asked as to School District 20, then he said that outside of the Bayou front he placed the price at $60.00 per acre, and the Bayou frontage $150.00, including the Battle Gorunds and the section down there below School District 20, and running back a mile from the Bayou, just a zone along the Bayou.

As to the section between San Jacinto River and Cedar Bayou, School Districts 38, 17 and 30, the witness said that School District 30 is mostly timbered, practically all of it, with small amounts of prairie, valued by him at from $12.00 to $15.00 per acre. It was poor, sandy land. That School District 17 is mostly prairie, except a strip of about one and a half miles along the San Jacinto River, some of the best land in Harris County; Cedar Bayou land is known all over the county as good land and one of the biggest settlements in the county is around Crosby, Bohemian settlers, well drained land, worth from $25.00 to $50.00 per acre. North of the Railway not well drained, not over $15.00 to $20.00 per acre. Land in the South end of 17 is mostly rice land, includes part of School District 15 on Cedar Bayou and 38 on San Jacinto Bayou; a great deal of 38 is marsh

land, but higher land in 38, largely timber, valued in 1915 by witness at $15.00 to $18.00 per acre. No. 38 largely Bayou front, the frontage valued by him at about $50.00 per acre, and the remainder at about $15.00 per acre, the upper end from $25.00 to $35.00 per acre.

As to School Districts 28, 35, 32, 18 and 16 lying between the San Jacinto River and Green's Bayou and No. 29, all the way to Montgomery County, the witness said that all of 18, 16, 32,
363 28 and 29 would range from $250.00 per acre to $15.00.

The Bayou frontage around Clinton and Penn City being $250.00 per acre, that 18 and 16 are practically all timber. That open prairie between the San Jacinto River and Forma, which was at one time a big rice farm and all black land is worth about $20.00 an acre. That the timber is not worth much, nor the land very much, except on account of its location, not worth less than $20.00 per acre, but it could not be bought at that price now. Going North of No. 32 it is practically all timber, a little prairie land, is second-rate, worth about $15.00 per acre. The timber has been mostly cut off.

As to No. 35, part of it gets into the oil region. The witness stated that if it was not oil land it was not much value, worth $15.00 to $20.00 per acre on account of the timber. The witness said that he had bought and sold land in Humble and he didn't know whether he could qualify as to the values in Humble oil field, that there were a great many things he didn't know about it.

Over objections he testified that the values were all sorts, from $50.00 to $10,000.00 per acre, one could not tell much about it. That his firm had paid at the rate of $25,000.00 per acre for land there last year, not for themselves, but for clients. That the best of his opinion is the land in the Humble Oil Field would be worth around $250.00 per acre where it is considered and graded as oil land, and from that on up; that the reasonable average would be $250.00. That the field extended past the Stephenson into the Blanco Survey, where out of a 2,200 acre tract part had been sold at $200.00 per acre last Fall with the retention of 1/8 royalty, and that the prices the witness had given were of the land close to Humble about six miles from the River and four miles from Humble. That there was no production, but lots of attempted development East of the H. E. & W. T. Railway.

The witness stated that his firm had been interested in land around the Turning Basin on the Bayou, had sold some at $3,000.00 an acre last year to the City. That land that they owned in the Mag-
364 nolia Park Corporation he was willing to sell at $2,500.00 an acre.

Witness said that School District 25 is mostly prairie, some of the best garden lands in the county in it, worth about $150.00 per acre around Cross Timbers, including Little York, and everything up to Hall's Bayou; South of Hall's Bayou he didn't think any could be bought for less than $50.00 per acre.

As to School District 48, witness said it was all plotted land, with the exception of a little; that his opinion was that the black prairie

land was worth $75.00 per acre only about six miles from the City, and the balance of 48 about $20.00 per acre.

When asked about land up the I. & G. N. Railway, in the Spring District and the District South of it, 29, the witness said that it was second-rate soil, but first rate farm lands, mostly prairie, light, sandy, but more rolling than other parts of the country, the land not very productive, but by fertilizing raises the best crops, and worth in 1915 about $15.00 to $18.00 per acre.

As to School Districts 29, 48, 82, 3, 9, 1, 47, 41, and 39, including Rose Hill and the lands along Spring Creek down to 49, the witness said that it was rolling country, poor land, but big lot of German people there and they are making a living. The land is worth from $15.00 to $20.00 and some of improved places you cannot buy for $50.00, but thought that $15.00 to $20.00 would be a reasonable, fair average for all of that land.

As to the land South of the Rose Hill section, and crossing Cypress Creek, the witness said that it was largely prairie land and included North Houston, light, sandy soil, no heavy land, more or less high, spotted, has a pretty good size settlement around Callahan in No. 7, thrifty people, and of the average value of $20.00 per acre, excluding District 49, which was a grade higher and considerably darker and closer to Houston, and worth on an average of $25.00.

That he considered the rural parts of District 26 worth $25.00
365 to $200.00 per acre. That he was part owner of the Morton and Hinson surveys purchased in 1911, part subdivided into city lots, two acres near Bringhurst bringing at the rate of $600.00 per acre and purchased in 1911 at $30.00 per acre, and worth in 1911 $200.00 per acre on an average. The Henry Rinerman is worth more, $350.00 per acre in 1915, which had been offered, that he included the Morton and Hinson together at $200.00 per acre; that he didn't know what the assessments were, he thought about $25.00 per acre on a guess, but didn't remember it. That taking all of the Rinerman Survey, including Eureka and the part which belonged to the M. K. & T. Ry. the School District of Brunner, including about all of it, that on account of its proximity to the city, its average value was about $200.00 per acre.

As to School District 4, there is a big sweep of difference of values, that the land North of Simms' Bayou or Harris Creek and on down to Bray's Bayou is Herman Park. That it was too big a district and too much cut up into additions to give much idea of its value; that the Dickey Addition, part of the Reynolds' Survey, was worth about $300.00 a lot, that on the Bellaire Boulevard some sold in 1915 as high as $1,100.00 an acre and is now held at $1,700.00 an acre, but that that had nothing to do with what it was worth, and that his opinion, on account of complications of the situation if given in general terms, would be of little value; that he would have to go into great details; that this is not farming lands, but urban property and worth all the way from a few hundred dollars to a few thousand dollars per acre. The witness said that he individually, or his firm owned lands in different parts of the county, and represented other owners for the purpose of assessment, that he had been concerned in adjusting assess-

ments and with keeping his own assessments from going too high, that he assessed perhaps 100 pieces of the land in the county of different sizes and assessed them in 1915 and since, and had been so doing for the last fifteen years.

Over objection and exceptions he stated that the assess-
366 ments in the county were about 30% to 35½ of their true values.

On cross-examination by defendants the witness stated that his 18 acre tract lies just above the Turning Basin, running up to the water front and having about the biggest water front for the smallest piece of land on the Bayou; that he knew where the I. & G. N. 94-acre tract was, and his land lay below it. That the Belt line runs across the channel and goes through the Houston Harbor Addition and has terminal facilities and switch engine transfers, but as to the facilities of the I. & G. N. Railway on the Bayou the witness stated that he didn't know, except that it had a switch on the South side of the Bayou; that he didn't think that his property on the Bayou was more favorably situated than the I. & G. N. property, but that they were about a standoff; that his property had a frontage of about three-quarters of a mile, that he didn't know how the I. & G. N. was assessed, that they are paying taxes on it the same as he and others, but not getting any return.

The witness further testified that the I. & G. N. Railway had wormed up into the city until they got to Main Street and that they had the best situation in the world coming, as the witness thought, nearer to Main Street than any road, unless perhaps the Katy; but the Katy cannot run box cars up to Main Street. The witness said that he did not know the value of this franchise up into the city, but thought that it was worth the money, and imagined that the road would pay a good deal of money before it would give it up; thought that it was worth $100,000 to the railroad, just guessing at it, and stated: "I do not know anything about it, you are asking me about something I do not know anything about, but if I owned it I would not give it up for a whole lot."

As to School District #30 shown on the map, witness said that there was not very much settlement in that district. Huf-
367 smith is therein, but that district is mostly used as a grazing country for sheep, goats and cattle, and that the witness could not say what was its value for the use standpoint, but thought that the owners mostly got no value.

As to School District 30 the witness said that it had valuable timber, that the McGruder Survey had timber worth $15.00 per acre, and that most of District 28 North of the River was in the same sort of a situation, and that he didn't think there was a School District in the County but what had more land in cultivation, the average would not be above 5% or 10%, that he had made no investigation to determine what income people got for the cultivation of land in Districts 30 and 28, where very little was cultivated, but that he had investigated this all over the county mostly; that in School District 28 there was a cultivation of sugar cane, corn and cotton and sweet potatoes, etc., and that there a man with 10 acres can make a good

living for a big family. Ten acres would be worth $1,000.00, but that he could not figure a farmer making any profit unless he goes on a bigger scale than making a living; that he can make a living on ten acres but no profit, and that he himself, his wife and children would have to work and his mules too, but then it all de-
368 pended upon individual energy and thrift; that the witness might starve to death, whereas a Dutchman will make money and put it in the bank and feed his family besides; that one near Hall's Bayou had money in two banks and sells from $200.00 to $300.00 worth of cabbages, but that a sloth could not do this, that under ordinary conditions, taking 10 acres in School District 28 the land should return, after everything had been paid for, with anything like management at all, $10.00 an acre, or 10% on $100.00 value, and that it would do it. That he knew where it had been done, that he had a farm himself where it does it, and his rents were over $10.00 an acre, but that this was between Claudine and Dairy in School District 46. That he had another one in School District 10, or 46, and another one in Harris County, Section 3, and his rents last year on the lands in cultivation, for one-fourth, were over $10.00 per acre; that he owned the land and that it is worth over $50.00 per acre; that he had not taken into consideration interest on his investment, but was talking about what the land produced. The product was all in the hands of the man who handled it and the way he handled it, but that if these lands were properly handled it would produce $10.00 an acre, or better, clear profit, above everything. No one else knows the real value, because they will do more than anybody else knows what they will do. One man will tell you that it won't produce anything and another will tell you that it will produce $10.00 an acre. That in the witness's opinion all the land in the county, every acre, if properly handled, is good for something; that it has to be fertilized, but that if properly handled it will produce $10.00 per acre or better, clear profit; that he, witness is proud of this country and that it is good for a whole lot more than the people know it is good for. That as to whether or not he knew more about it than the people actually working it, the witness said that he did not say, that he thought he knew more about it than a buck negro.

That as to School District 29, through which the I. & G. N. Railroad goes, the witness said that he didn't think over 15% of it was in cultivation, that he owned eight acres there, and that he
369 knew a man who raised on that land $200.00 worth of Bermuda onions to the acre, and sold them, but that he didn't know how many acres were in onions in the District and didn't know a great deal about that locality, as to what it produced year to year, but that it was light, sandy soil, very responsive to cultivation, and if fertilized, will produce as good or better crops than the black land, but it has to be fertilized, it dries out, but will raise pretty good crops. The witness would not undertake to say what it was worth but that it bogged down no worse than the black land, through which you could not get a pick after a good hard rain.

As to School District No. 8, the witness said he had no land in it

but had land for sale in it, 1,200 acres. That on Cypress Creek is a big German settlement, sandy land, that he didn't know what it would produce per acre, or the productive value of the land, but that he knew from experience that good crops were raised on it, not his own. That he didn't think there would be a man in the county, unless one made that his business, could tell what an acre produces in one of these districts, that is, accurately; that in School District 27 he knew of six bales of cotton being raised on 12 acres, though it was a very bad year, with a storm, but that the year before they raised about a bale to the acre fertilizing heavily, barn yard fertilizer. The people don't count their labor, but figure that it costs them from $20.00 to $25.00 an acre to grow a bale of cotton, and he thought about $25.00 to put it in, take it out and sell it, and realize $60.00 to $80.00 an acre from the sale of that cotton, in 1914 and 1915, but there was a storm in 1915. That he had charge of this matter and had occasion to keep it checked up, and that in 1914 cotton brought from $60.00 to $80.00 a bale, in 1915 about 11¢, and that in his statements he had been figuring in the seed, which brought about $28.00 in 1914, and had included that in his estimate, and he was not talking about wages, but that the farmer would be left with some money in his pocket, the farmer didn't figure his time, that if you figured the farmer's time he was in debt from his infancy. That as to whether or not a man owning 100 acres could make a good
370 living out of it, that the witness's observations thereon were as to whether or not, counting the value of his labor, a man would come out better at the end of the year, if he had no land, the witness answered that it depended on the land, some day laborers would not come out at all, some would be in debt head over heels; some farmers will come out $2,000.00 or $3,000.00 ahead. That if a farmer will intelligently handle a farm a farm will make money. Some day laborers will be thrifty and have money in the bank, some will come out in debt. Nothing could be based on the inquiry, some men will prosper and some will not, but that the witness's experience was that the average good man, if he understood farming and was well equipped, would make money, and that that was his experience, and that part of the productive value of the land is brought about by the farmer's thrift and his labor, the land would not raise a thing if the man didn't cultivate it, one has to work and work the land good and hard in any country.

The witness was asked to take the value of Harris County lands and figure in the labor of farmers on it, what it is reasonably worth, and their expense and the value of their teams and tools, and to state how he thought they would come out as a general proposition. He answered that he didn't understand the question. It was then stated to the witness that it was desired to get at the value of the land from the standpoint of the man actually working and making the crop, with the general value of his land and the application of his labor and his investment outside of the land. The witness answered that he didn't believe that there was any exception in this county, that he believed that every man who had properly applied himself to farming in Harris County had made good, with a few exceptions of where

they had been blown away with cyclones or something like that, that sometimes the rice farmer fails to get water and he goes broke, and that sometimes the cotton farmer is too negligent to work and make a crop and is bound to go bro[illegible]nd so is every other man; if every man applies himself [illegible] bound to make good and have a
371 bank account. That i[illegible]ny German or Italian farmer in this county was asked, t[illegible]ere won't be one exception in a hundred but would have a bank accou[illegible]nt and money in their own pocket, and they make it out of their farms, but that outside of his own experience he didn't know how much money the best farmer in the county makes in a year, that from the standpoint of what land is worth on a use bases, taking into consideration the application of their labor and expenses, he didn't know what it was worth, and had never figured it out.

(25) It was agreed that the allegations of the plaintiffs, in their petition, of the amount apportioned to Harris County by the State Tax Board, as its proportion of the intangible values made by that Board on account of the I. & G. N. Railway, is correct, and that the amount of taxes claimed there as stated in the plaintiffs' petition, that is, taxes on intangibles, is correct. It was agrred that the mileage of the railway, as alleged in plaintiffs' petition and the mileage in Harris County was correct.

372 (26) J. M. Hiser, recalled by the plaintiff- and examined by them, testified:

That the First National Bank of Houston is one of the largest, next he presumed, the South Texas C[illegible]mmercial National, that he had the assessment for 1915 of the South [illegible]exas Commercial, which was then exhibited in evidence and it [illegible]howed that the stock was assessed at 70% of the book value witho[illegible] deduction for real estate, or any deduction for any real estate outside of Harris County. This appeared from the assessment and the testimony of the witness.

The assessment was introduced in evidence over the objection and exception of the defendants, and was the assessment for 1915. The witness further testified that real estate and all assets were charged directly to the bank, and shares of capital stock under the name of the bank to each and every [illegible]reholder, but that the bank made one table of it all and paid the ta[illegible].

The plaintiffs next introduced, over the objection and exception of the defendants, the rendition of the First National Bank of Houston for 1914, and the tax roll founded thereon. This rendition showed no allowance or deduction made for real estate, the same being included in the value of the shares assessed, and the witness said the taxes were paid by the bank as in the case of the South Texas Commercial, 70% of the book value of the stock was assessed.

The plaintiffs next introduced in evidence the assessment and tax roll of the Houston National Exchange Bank for 1915, and that roll and rendition taken together, showed a deduction for real estate, being real estate stated to be of the value of $1,035.00 lying in Fort Bend County, and stated to be deducted as in other instances, 70% of the book value of the stock [illegible]as assessed.

The plaintiffs next introduced in evidence the rendition, assessment and tax roll covering the Union National Bank for 1915, and over objections and exceptions it was shown that there was no allowance made for any real estate deduction out of Harris County,
373 and that the real estate was all covered in the assessment of the stock at 70% of its book value.

The plaintiffs next introduced the rendition, assessment and corresponding tax roll for 1915 of the National Bank of Commerce of Houston, Texas, which showed no deduction for real estate, or other tangibles existing in any other county than Harris County, and that the assessment of the real estate and tangibles was all taken up in the assessment of 70% of its book value of the stock. All of this was shown over the objection and exception of the defendants.

Plaintiffs next introduced the assessment and corresponding tax roll and rendition for 1915 of the Lumbermans National Bank of Houston, Texas, showing that the stock was assessed in 1915 at 70% of its book value, and that all tangibles and real estate were taken up in this assessment of the stock, and that there were no deductions for intangibles outside of Harris County.

Cross-examination of the witness Hiser.

By the Defendants:

The witness said that as to the best of his knowledge the County and State had never assessed in Harris County anything for franchise values of the I. & G. N. Railroad; that the assessments were taken as made per mile, and that the Assessor here had nothing to do with the franchises, and that the raise of 25% made in 1910 on certain property, and testified to, had not, to the best of the witness's knowledge, been applied to the railroads, that as a general proposition the renditions made by the railroads of the physical property was taken, but that the physicals of the railroads were not always left to stand as rendered; that the witness did not remember whether or not any concession had been made to the railroads on account of the intangible values being made by the State Tax Board, and being taken without deduction. That he never heard of any such thing, and that there is nothing to recall such a contention to his mind.

That the Southern Pacific Railroad's Land Agent's name is Cox; that he did not remember Cox being before the Board, but that the witness was with the Clerk of the Board, and consequently
374 would not have known about these matters, unless called to his attention, that he would not be in the office of the Board of Equalization. That he did not think that in 1908 the mileage was referred to the Board, that is, the mileage rendition of the S. P., but he remembered an argument with Cox about some land on the Thomas and Brown Surveys not used for rig of way, and which the witness was unwilling to put in as milea That in a way, of course, all of these matters were referred t the Board, as every assessment was due to the fact that it was afterwards decided in complying with the Full Rendition Law; that practically the

Assessor's Office had ⅔ of all of the real value of the property, and he cut the other ⅓ and therefore, added 50%.

On Re-direct examination Mr. Hiser stated, in connection with the testimony that he had given that there was no special effort made, except in 1910, to get the whole or true value of property, but that then it was thought that the values in the Southern part of the City had outgrown those in the other parts, and an addition was made to valuation of 25% on that.

(27) H. G. Lidstone, Assistant in the Assessor's Office recalled by the plaintiffs testified on examination by them over the objection and exception of the defendants.

That he had added the total of the tax values for 1915 of all the blocks in the City of Houston, which he had valued on the basis of their true values, as has heretofore been testified to by them, and that also he had added together the true valuations of all these blocks in order to get the total of true values; that the ratio of the assessment thereof for 1915 to the true values was 46.6 or .466 or 46 and a fraction hundredths. That the total assessed value was $36,533,875.00 and the total true value $78,601,795.00 and that all of this was shown by the sheets now exhibited by the witness, and introduced in evidence, the sheets showing these results.

The witness further testified that other than the intangibles, real or supposed of the railroads, that he knew of no
375 intangibles of any other corporations or concerns borne upon the rolls of Harris County for 1915, and that he would know of their existence, if they were upon the rolls, and over the objection and exception of the defendants the witness further testified that the Texas Company had its domicile and home office here in Houston, and that there was on its assessment rolls tangibles, and no intangibles, and that upon its assessment for 1915 no intangibles were included along with tangibles; that the assessed value was put on the real estate of the Texas Company as a piece of land, and so as to barrels of oil and other properties.

That as to the Levy Dry Goods Company, that its tangibles were assessed as tangibles and not with any additional value added on account of intangibles, and so, that the Houston Printing Company, the owner of the Houston Post, was assessing its land at so much, its house at so much, and its machinery at so much, not to include any intangibles, and that the stock of the Houston Printing Company was not assessed at its value; and that the Houston Chronicle, or the corporation that owned that newspaper, was assessed on the same principles as the property of the Houston Printing Company.

That the Cotton Seed Oil Company, the Peden Iron Company, the grocery companies, and the corporations had none of their stock assessed or put on the rolls; that their physical properties were assessed on the same basis as he is testifying in the case of the other concerns mentioned above, and that no partnerships, individual enterprises or corporations, other than National Banks, and other than those that are mentioned, were assessed on their stock, and that none of the stock of these corporations were put on the rolls;

that their land, improvements and machines were assessed without adding anything for intangibles, and that for 1915 none of the owners of the stock of the Houston Printing Company, Levy Bros. Dry Goods Company, or any other corporation had their stock put on the assessing rolls, and that there was no attempt made by the Assessing Authorities to have that done.

Cross-examination of witness Lidstone.

By the Defendants:

376 The witness said that he did not know who owned the stock of the Houston Printing Company, but he thought that he knew some of the stockholders, and also some of the stockholders of the Houston Chronicle, nor did he know who owned the stock of the Texas Company, but he knew some of the stockholders of the corporations named. That so far as he knew 999/1000 of the stock of the Texas Company may have been owned outside of Harris County, or by foreigners, and that of the other corporations, the stockholders may be largely non-residents, except in case of local people, like Peden and Levy and others whom he has mentioned. That in Harris County the Texas Company and other oil companies are subjected only to the ad valorem tax, none of them pay a franchise tax. But the witness said that he would not be informed as to whether they paid direct to the State or not, franchise taxes.

On re-direct examination by plaintiffs, the witness said that he did not know where the stockholders of the I. & G. N. Ry. lived. That there may be one or two local, but that his information was the others lived in New York, and that those who lived here did not render their stock.

Here the plaintiffs rested.

377 II.

Evidence of the Defendants.

(1) The defendants introduced in evidence renditions of the I. & G. N. Ry. properties made by it, or the Receivers, in Harris County for the year 1915 as follows:

(*a*) Rendition of 25 49/100 miles called the main track at $419,530.00.

(*b*) Rendition of what is called by the Railway the Houston Belt & Terminals division, consisting of 10.30 miles rendered at $332,000.00.

(*c*) Rendition of that portion of what is called the Fort Worth Division situated in Harris County containing 13.06 miles rendered at $8,250.00 a mile, or a total of $107,745.00.

(*d*) Rendition of what is called the Columbia Tap, as far as in Harris County, being 13.35 miles of railroad rendered at $105,000.00.

(*e*) Rendition of rolling stock of the Railway, and for the whole Railway made in Harris County as containing the principal office of the county and showing description of the equipment rendered and a total rendered value of $2,168,919.00 for the entire state set out by Counties the proportion, which, on the mileage basis for Harris County is $141,603.00 and apportioned to Harris County on the basis of 74.73 miles; intangibles being apportioned to the basis of 62.1 miles, this difference being due to the fact that the I. & G. N. is a tenant line of the G. H. & H. R. R. in Harris County, the apportionment of the intangibles being based on the number of lines owned in Harris County and the apportionment of rolling stock being based on the number of lines operated in Harris County.

(*a*) This is a line from Houston North and the assessment includes the yards at Spring, stated to be the same as in 1913 and 1914, acreage not totaled. (*b*) The Houston Belt & Terminal included the freight terminals and in the mileage the land below the Turning Basin on the Bayou; assessment stated to be the same as in 1913 and 1914, total acreage outside of city lots stated to be 110.35. (*c*) The Fort Worth Division in Harris County extends West from Spring to Montgomery County line, total acreage stated to be 200.36, and rendition stated to be the same as that in 1913 and 1914. (*d*) The Columbia Tap Branch in Harris County running from in Houston Southwestwardly, total acreage stated to be 105 and assessment same as in 1913 and 1914.

378 (2) The defendants next offered in evidence comparative general balance sheet contained on pages 59 to 62 of the report of the Railroad Commission by the I. & G. N. Ry. Co. for the year ending June 30th, 1914. This document was introduced and is as follows:

(Here follows reproduction of comparative general balance sheet, marked pages, 379, 380, 381, and 382.)

COMPARATIVE GENERAL BALANCE SHEET

June 30 1913		ASSETS	June 30 1914		Increase or Decrease
ITEM	AMOUNT		ITEM	AMOUNT	
		PROPERTY INVESTMENT:			
		I. Road and Equipment			
		B 1-A. Investment to June 30, 1907-			
		(a) Road - Page 31			
		(b) Equipment - Page 31,			
		B 1-B. Investment since June 30, 1907-			
32,365,428.06		(a) Road - Page 31,	32,562,133.57		
3,588,824.59		(b) Equipment - Page 31,	4,820,147.82		
81,982.90	36,036,235.55	(c) Gen'l Expenditures - Page 31	88,666.85	37,470,948.24	1,434,712.69
	194,858.73	B 1-C. Reserve for Accrued Depreciation-Cr.		227,814.80	32,956.07
	35,841,376.82	Total,		37,243,133.44	1,401,756.62
		II. Securities -			
		B. 2. Securities of Proprietary, Affiliated and Controlled Companies - Pledged-			
		(a) Stocks - Page 43			
		(b) Funded Debt - Page 45			
		(c) Miscellaneous - Page 43			
		B. 3. Securities Issued or Assumed-Pledged-			
		(a) Stocks - Page 43,			
	12,150,000.00	(b) Funded Debt - Page 45,		12,150,000.00	
		(c) Miscellaneous - Page 43,			
		B. 4. Securities of Proprietary, Affiliated and Controlled Companied - Unpledged-			
		(a) Stocks - Page 43,			
		(b) Funded Debt - Page 45,			
		(c) Miscellaneous - Page 43,			
	12,150,000.00	Total,		12,150,000.00	
		III. Other Investments -			
		B. 5. Advances to Proprietary, Affiliated, and Controlled Companies for Construction, Equipment and betterments -			
		B. 6. Miscellaneous Investments -			
	7,409.19	(a) Physical Property -		7,409.19	
		(b) Securities - Pledged -			
		(c) Securities - Unpledged			
	7,409.19	Total,		7,409.19	

Page 379.

COMPARATIVE GENERAL BALANCE SHEET

June 30, 1913		ASSETS-Concluded	June 30 1914		Increase or Decrease
ITEM	AMOUNT		ITEM	AMOUNT	
		WORKING ASSETS:			
	276,808.08	B. 7. Cash,		202,341.13	74,466.95
		B. 8. Securities Issued or Assumed-Held in Treasury-			
	500.00	(a) Stocks -			
		(b) Funded Debt -		500.00	
		(c) Miscellaneous			
		B. 9. Marketable Securities -			
	4,400.00	(a) Stocks -		4,400.00	
		(b) Funded Debt -			
		(c) Miscellaneous			
		B/10. Loans and Bills Receivable			
	97,182.61	B.11. Traffic & Car Service Balances due from other Cos.		91,726.49	5,456.12
	167,274.94	B.12. Net Balance Due from Agents & Conductors,		142,757.11	24,517.83
	341,757.56	B.13. Miscellaneous Accounts Receivable,		449,561.60	107,804.04
	673,409.44	B.14. Materials and Supplies,		715,550.96	42,141.52
	1,224.82	B.15. Other Working Assets,		3,688.43	2,463.61
	1,362,557.45	Total,		1,610,525.72	47,968.27
		ACCRUED INCOME NOT DUE:			
		B.16. Unmatured Interest, Dividends and Rents Receivable			
		DEFERRED DEBIT ITEMS:			
		B.17. Advances-			
		(a) Temporary Advances to Proprietary, affiliated & Controlled Companies,			
		(b) Working Funds,		633.53	633.53
		(c) Other Advances,			
	8,045.88	B.18. Rents and Insurance Paid in Advance,		9,105.21	1,059.33
		B.19. Taxes Paid in Advance,			
		B.20. Unextinguished Discount on Securities-			
		(a) Unextinguished Discount on Capital Stock-			
	51,119.53	(b) Unextinguished Discount on Funded Debt -			51,119.53
		B.21. Property Abandoned, Chargeable to Oprg.Expenses			
		B.22. Special Deposits,			
	19,500.85	B.23. Cash & Securities in Sinking & Redemption Funds		18,046.00	1,454.85
		B.24. Cash & Securities in Insurance & Other Reserve Funds			
		B.25. Cash and Securities in Provident Funds -			
	242,283.53	B.26. Other Deferred Debit Items,		78,250.69	164,032.83
	320,949.78	Total,		106,035.43	214,914.35
		PROFIT AND LOSS:			
		B.27. Balance - Page 37,			
	49,882,293.24	GRAND TOTAL,		51,117,103.78	1,234,810.54

June 30, 1913		LIABILITIES:	June 30, 1914		Increase or Decrease
Item	Amount		Item	Amount	
		STOCK:			
		B.28. Capital Stock, Page 17 -			
	1,422,000.00	(a) Common Stock - (Held by Company / Not Held by Company)		1,422,000.00	
	3,400,000.00	(b) Preferred Stock - (Held by Company / Not Held by Company)		3,400,000.00	
		(c) Debenture Stock - (Held by Company / Not Held by Company)			
		(d) Receipts Outstanding for Installments paid,			
		B.29. Stock Liability for Conversion of Outstanding securities of Constituent Co's,			
		B.30. Premiums Realized on Capital Stock,			
	4,822,000.00 ✓	Total,		4,822,000.00	✓
		MORTGAGE, BONDED AND SECURED DEBT:			
		B.31. Funded Debt - Page 19,			
12,150,000.00		(a) Mortgage Bonds (Held By Co. 12,150,500. / Not Held By Co. 14,129,500.)			
13,594,500.00	25,745,000.00		26,280,000.00	26,280,000.00	535,000.00
	11,000,000.00	(b) Collatl.Tr.' (Held By Co. / Not Held By Co.)	11,000,000.00	11,000,000.00	
		(c) Plain Bonds, Debentrs&Notes (Held By Co. / Not Held By Co.)			
		(d) Income Bonds (Held By Co. / Not Held By Co.)			
	209,000.00	(e) Equip.Tr.Obgns (Held By Co. / Not Held By Co.)	1,135,100.00	1,135,100.00	926,100.00
		(f) Misc'l Funded Obligations (Held By Co. / Not Held By Co.)		4,900.00	4,900.00
		(g) Receipts Outstanding for Funded Debt,			
		B.32. Receivers' Certificates -			
		B.33. Obligations for Advances Received for Construction, Equipment and Betterments,			
	36,954,000.00 ✓	Total,		38,420,000.00	✓ 1,466,000.00

COMPARATIVE GENERAL BALANCE SHEET - CONCLUDED

June 30, 1913		LIABILITIES: - Concluded.	June 30, 1914		Increase or Decrease
Item	Amount		Item	Amount	
		WORKING LIABILITIES:			
		B.34. Loans and Bills Payable		60,000.00	60,000.00
	339,872.85	B.35. Traffic & Car Service Balances due other Cos.		264,455.09	75,417.76
	834,733.75	B.36. Audited Vouchers and Wages Unpaid,		1,376,298.37	541,565.02
	9,073.56	B.37. Miscellaneous Accounts Payable,		5,517.37	3,556.19
	4,795.00	B.38. Matured Interest, Dividends & Rents Unpaid,		9,030.00	4,235.00
		B.39. Matured Mortgage, Bonded & Secured Debt Unpaid			
		B.40. Working Advances Due to other Companies			
	11,411.08	B. 41. Other Working Liabilities,		2,365.99	9,045.09
	1,199,885.84	Total,		1,717,666.82	517,780.98
		ACCRUED LIABILITIES NOT DUE:			
	370,558.33	B.42. Unmatured Interest, Dividends & Rents Payable		402,393.06	31,834.73
	178,994.07	B.43. Taxes Accrued,		116,098.17	62,895.90
	549,552.40	Total,		518,491.23	31,061.17
		DEFERRED CREDIT ITEMS:			
		B.44. Unextinguished Premiums on Outstanding Funded Debt			
	45,015.37	B.45. Operating Reserves,		121,361.20	76,345.83
		B.46. Liability on Account of Provident Funds,			
	5,303,636.24	B.47. Other Deferred Credit Items,		5,290,677.00	12,959.24
	5,258,620.87	Total,		5,169,315.80	89,305.07
		APPROPRIATED SURPLUS:			
		B.48. Additions to Property since July 30 1907, through Income,			
		B.49. Reserves from Income or Surplus,			
		(a) Invested in Sinking & Redemption Funds			
	80,000.00	(b) Invested in Other Reserve Funds,		80,000.00	
		(c) Not Specifically Invested,			
	80,000.00	Total,		80,000.00	
		PROFIT AND LOSS:			
	1,018,234.13	B.50. Balance - Page 37		389,629.93	628,604.20
	49,882,293.24	GRAND TOTAL,		51,117,103.78	1,234,810.54

383 (3) Defendants next offered in evidence a communication from Thos. J. Freeman, at that time Receiver of the I. & G. N. R. R. Co. and also General Manager, addressed to the Railroad Commission of Texas and dated May 5th, 1911, and offered on the statement of Counsel that it was filed in connection with the application for the issuance of bonds. To the introduction of this document the plaintiffs objected, but their objection was overruled, and over their exception it was introduced in evidence, and is as follows:

384 International & Great Northern Railroad Company.

Thomas J. Freeman, Receiver and General Manager.

Houston, Texas, May 5th, 1911.

To the Railroad Commission of Texas,
Hon. Allison Mayfield, Chairman,
Austin, Texas.

GENTLEMEN:

On the 16th of this month the International & Great Northern Railroad will be sold out under foreclosure proceedings, and will be bought in by certain individuals who desire to reorganize the road, and for the purpose of properly perfecting said reorganization it will become necessary to issue both new bonds and stock. It is very desirable that the Commission fix the amount of stock and bonds that may be issued against the property prior to the sale, as the amount so fixed by the commission will remove any doubt as ti the question of securities to be issued hereafter.

The purchasers at said sale will reorganize the property under the existing Texas laws. The amount of stock and bonds desired to be issued on the property is $35,000,000.00 which is at the rate of $31,645.00 per mile of road owned, and at the rate of $30,185.00 per mile of road owned and operated. This amount, I respectfully state, is much less than the actual value of the road, not including its good will. The actual cost of road and equipment of the International & Great Northern Railroad Co., amounts at this time to the sum of $40,876,729.22. This does not include any betterments prior to July 1, 1907, and this value does not include the enhanced value of its terminals, or the enhanced value of its lands and right-of-way and depot property of every kind since same were purchased, in many instances more than thirty years ago, nor any donations or subsidies, and merely represents the actual expenditure of money in road and equipment. This Commission, is about January, 1895, had a physical valuation made of the International & Great Northern Railroad, at that time consisting of 772.3 miles. At the time said valuation was made, every item and element entering into the value of railroad property was at a very low figure, and the amount of the valuation found at that time by the Railroad Commission did not fairly and justly represent the actual value of the property, nor did it represent fairly and justly the actual cost of the property up

to that time. This 772.3 miles of road has been greatly increased in value by permanent betterments, additions and improvements, besides its original right-of-way, depot grounds and other landed properties have greatly increased in value, approximately at least 33⅓ per cent. The Ft. Worth Division of the road, consisting of 323.5 miles, has never been finally appraised by your honorable body for stock and bond purposes, but was only partially appraised, as it was not necessary to have a final appraisement in order to issue the bonds that were issued on that division of the road. I would respectfully state that, taking the Commission's own valuation, which was much less that the actual value of the property, and adding thereto additions, betterments and permanent improvements since that time, it shows said property to be worth, upon this basis alone, the sum of $32,702,972.38. And should this Commission add, even to this value, 10 per cent, for franchises, it would give a valuation exceeding $35,000,000.00.

I would further beg to state that all of the terminal properties of this road have greatly enhanced in value, even within the
385 last ten years; that the Magnolia Park Railroad, which was purchased a few years ago at Houston, has greatly increased in value, and is worth, approximately, a million dollars more than at the time it was purchased.

I would further state that this company owns and possesses a forty years' contract for trackage rights over the G. H. & H. R. R. between Houston and Galveston, and the use of the terminals of that company both in Houston and Galveston; that this trackage right is a very valuable asset, and same has never been taken into consideration or considered a part of the property of this road for the purpose of issuing stock and bonds. At the very lowest figure this trackage right is worth, approximately, one million dollars; that if these additional values are added to the Commission's old valuation, plus betterments, improvements and additions it would make, even upon this basis, a value in excess of $35,000,000.00.

I would further state that the property of this road has been appraised by the Intangible Tax Board for a period of years in excess of $35,000,000.00, to-wit: In 1907 it was appraised by the State Intangible Tax Board at $36,908,422.00; in 1908, $35,663.779.00; in 1909, $35,795,416.00; in 1910, $35,795,416.00; and notice has just been received from said Tax Board, who in their preliminary finding find the road to be worth $36,076,982.00.

I would state that the facts as herein recited are nearly all matters of record in the Commission's office, or shown by the records of this road, which are subject to the inspection of your Honorable Body in order to verify these facts. I attach hereto certain statements in which these facts are set out in more minute detail.

I would further state to the Commission that the plan of reorganization, as outlined up to the present time, is a very valuable one, and it is to the interest of the property and the owners of same that said reorganization be perfected at this time; that with a capitalization of $35,000,000.00, the fixed charges of the new company will be much less than heretofore, and its capitalization, including cost

of road and equipment and liabilities will be approximately reduced to the extent of at least $11,000,000.00 that all of the indebtedness required under the law of Texas to be paid by the company reorganizing, will be paid when the company is reorganized.

I would further state that under the facts set forth herein, which are matters of record, or subject to quick investigation and ascertainment, there will be no necessity, in my opinion, for a physical revaluation of the property, but that the amount asked for its ascertainable without a physical revaluation, and the amount asked for is far less than the actual value of the property; that the purpose of the stock and bond law was to enable the Commission to certify that property to the full value of the stock and bonds authorized to be issued, actually existed. The amount asked for in this instance is far — than the actual value of the property as it exists, by several millions of dollars. The International & Great Northern Railroad goes through the best part of Texas; its business will increase from year to year; it has an established good will, and with the amount of its capitalization reduced to $35,000,000.00, it carries with it the positive assurance that its fixed interest charge will be cared for.

*I*t would further state that the plan of reorganization of the new company call- for an improvement fund of $3,000,000.00, the expenditure of which amount will place the property in a fine physical condition, and greatly reduce its operating expenses, giving a further assurance of its ability to meet all of its obligations in the future.

386 For the reasons specified I respectfully ask this Commission to appraise the property of the International & Great Northern Railroad as it now exists, for the purpose of a new issue of stock and bonds by a reorganized company, at and for the sum of thirty-five million dollars, the stock and bonds to be divided as the owners of the reorganized property may elect.

Respectfully submitted:

THOMAS J. FREEMAN,
Receiver.

387 (4) The defendants next introduced in evidence Sec. 22 of Answer of the I. & G. N. Ry. Co. filed in the present Receivership proceedings in the District Court of the United States for the Southern District of Texas, Sept., 1914, in the case of the Central Trust Company of New York, Complainant, vs. I. & G. N. Ry. Co., pending in the District Court of the Southern District of Texas; and Sec. 24 contained in the answer of the I. & G. N. Ry. Co. in the same case to the amended and supplemental Bill of Complaint of the Central Trust Company of New York filed January, 1915. The two Sections are as follows:

"22. Defendant further alleges that the reasonable value of its railroads and properties is largely in excess of all its lawful debts and obligations both secured and unsecured, and that said property is ample in value to produce at foreclosure sale, if such sale be had at a proper time and under fair conditions, funds far more than suffi-

cient so that the distributive share of the proceeds of such sale apportionable to said $13,750,00- face amount of First Refunding Bonds pledged as collateral security for the payment of said $11,-000,000 face amount of Three-Year Five Per Cent. Gold Notes will be amply sufficient to pay the said notes in full, together with the interest thereon."

Section 24 of the Answer to the Amended pleading of the Complainant is identical with Sec. 22 just above quoted.

(5) The defendants next introduced in evidence a petition filed by the Receivers in the case of the Central Trust Company of New York vs. I. & G. N. Ry. Co. No. 49 in Equity, now pending *in the*—

In the District Court of the United States for the Southern District of Texas, at Houston.

In Equity.

No. 49.

CENTRAL TRUST COMPANY OF NEW YORK, Complainant,

vs.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Defendant.

To the Honorable District Court of the United States for the Southern District of Texas:

Your Petitioners, Jas. A. Baker and Cecil A. Lyon, Receivers herein, respectfully show to the court that after taking charge of the property and affairs of the International & Great Northern Railway Company as Receivers, they find that on or about the 19th day of November, 1895, the Galveston, Houston & Henderson Railroad Company of 1882, a railway corporation, made and entered into a certain written contract with the International & Great Northern Railroad Company relating to trackage rights and joint use of facilities in the Cities of Galveston and Houston, Texas, and a certain line of railway owned by the said Galveston, Houston & Henderson Railroad Company extending from Galveston, Texas, to the City of Houston, Texas. This contract enabled the said International & Great Northern Railroad Company, and its successor the International & Great Northern Railway Company to have its cars, passengers, merchandise and tonnage operated and transported between the Cities of Houston and Galvaston, Texas, and practically gave and conferred upon the said International & Great Northern Railroad Company and its successor various rights concerning the operation of its trains between the said Cities and the use of various facilities.

Petitioners hereto attach a copy of said contract for the inspection of the court, so that its full terms and provisions may be seen and

examined. They show the court that in consideration of the said Galveston, Houston & Henderson Railroad Company receiving, delivering, keeping, caring for and transporting passengers, merchandise, tonnage and cars of the International & Great Northern Railroad Company according to the agreement and contract made, it was provided that the said International & Great Northern Railroad Company should pay to the said Galveston, Houston & Henderson Railroad Company, as compensation, the sum of Sixty-two Thousand Dollars ($62,000.00) per annum, Twelve Thousand Dollars ($12,000.00) of which was to be paid in equal monthly installments of One Thousand Dollars ($1,000.00) on the 10th day of each month, and the remaining Fifty Thousand Dollars ($50,000.00) of such compensation should be paid by the International & Great Northern Railroad Company to the Mercantile Trust Company, Trustee of certain mortgage bonds of the said Galveston, Houston &
Henderson Railroad Company in two semi-annual install-
388 ments of ($25,000.00) Twenty-five Thousand Dollars each
not later than the days preceding the first days of April and October, respectively, in each year. Further provisions were made with reference to the disposition of the amounts so paid the said Mercantile Trust Company, Trustee. It also provided that the said International & Great Northern Railroad Company should do and perform other things and matters as is fully set forth and contained in said rental contract.

Your petitioners now call the attention of the court to Article IV in said contract wherein it was provided that if the said International & Great Northern Railroad Company should fail to meet any of the payments provided for in said agreement for the period of six months after the same should become due and payable, then the said agreement should, at the option of the Galveston, Houston & Henderson Railroad Company, be immediately terminated and be annulled and void, and that the said Galveston, Houston & Henderson Railroad Company might, upon notice of five days, remove and exclude the trains and cars of the said International & Great Northern Railroad Company from the said line of Railway, etc.

Your petitioners now show the court that the rights possessed by the International & Great Northern Railroad Company under and by virtue of said contract, together with the obligations attached thereto, have passed to and become the property of the International & Great Northern Railway Company by virtue of an agreement between the Galveston, Houston & Henderson Railroad Company and the International & Great Northern Railway Company dated April 1st, 1913; and they show the court that according to their information, both the said International & Great Northern Railroad Company and the said International & Great Northern Railway Company have kept and performed each its obligations with reference to said agreement.

Petitioners further show the court that by virtue of an agreement between the Galveston, Houston & Henderson Railroad Company and International & Great Northern Railway Company and Central Trust Company of New York, of date April 1st, 1914, the contract

heretofore recited was modified so that the minimum annual fixed compensation payable to the Galveston, Houston & Henderson Railroad Company should be and was increased during the residue of the term of said agreement and commencing from April 1st, 1914, to the amount of Sixty-five Thousand and Fifty Dollars ($65,050.00), of which amount Twelve Thousand Dollars ($12,000.00) should be paid by the International & Great Northern Railway Company to the Galveston, Houston & Henderson Railroad Company in equal installments of One Thousand Dollars ($1,000.00) each, on the 10th day of each and every month beginning with the month of April, 1914, and the remaining Fifty-three Thousand and Fifty Dollars ($53,050.00) of the above amount shall be paid by the International & Great Northern Railway Company to the Trustee, or its successors in the trust, in two semi-annual installments of Twenty-six Thousand Five Hundred and Twenty-five Dollars ($26,525.00) each, not later than dates preceding the 1st days of April and October, respectively, in each year, said payments to be applied by the Trustee to the payment of one-half of the semi-annual interest on Two Million, One Hundred and Twenty-two Thousand Dollars ($2,122,000.00) face amount of first mortgage bonds to be issued as aforesaid.

Your Petitioners state that according to the terms of said agreement there will fall due on said contract on the 10th day of October, 1914, the sum of One Thousand Dollars ($1,000.00), and there will likewise be due an equal sum on the 10th day of each succeeding month so long as said agreement is in force; also that on the
389 1st day of October of this year, and on the 1st days of April and October of succeeding years there will fall due the sum of Twenty-six Thousand Five Hundred and Twenty-five Dollars ($26,525.00) for each date to be paid by the said International & Great Northern Railway Company.

Your Petitioners state that it is material to the interests of Complainant and Defendant in this case, as well as to other parties interested in the property of the International & Great Northern Railway Company, that the terms and provisions of these contracts be kept and maintained; that it would be disastrous to the property to have said contracts annulled.

Petitioners say that by the order appointing them Receivers they are authorized and directed, in their discretion, from time to time, out of the funds coming into their hands, to pay "(5th) All sums due or to become due as rental for railroad, terminal or other facilities used by the defendant Railway Company"; that by this authority Petitioners believe they are authorized to make the payments indicated, but that your Petitioners desire, for their fuller protection, express authority of the Court to pay the amounts stipulated as rental for the use of the Galveston, Houston & Henderson Railway tracks and other facilities, and further pray the court that during the term of this Receivership, unless otherwise ordered, that they be permitted, directed and authorized to keep and maintain the terms and provisions of said contracts, and for that purpose to make all proper payments and outlays necessary and needful to keep said contracts in

force, and to enable them, as Receivers, to continue the use and enjoy the benefits provided for in such contracts.

Respectfully submitted,

JAMES A. BAKER,
Per W.,
CECIL A. LYON,
W.,
Receivers.

WILSON, DABNEY & KING,
Counsel for the Receivers.

(6) The defendants next introduced in evidence Exhibit "A" page 2 of the report of the Receivers to the State Tax Board, dated 1916 covering statistics for the year 1915 stating that it was particularly introduced in order to call the court's attention to the mail revenue and the express revenue for the year 1915. This documents was as follows:

EXHIBIT "A."

Gross Receipts of the International & Great Northern Railway Co., Jas. A. Baker and Cecil A. Lyon, Receivers, from All Sources, Year Ending December 31st, 1915.

Freight Revenue	$6,742,801.47
Passenger Revenue	1,682,213.94
Mail Revenue	246,373.74
Express Revenue	181,999.98
Other Transportation Revenue	119,924.64
Incidental	107,949.98
Joint Facility	11,636.23
Joint Facility Rent Income	69,410.74
Hire of Equipment	395,982.18
Non-Operating Physical Property	658.37
Donations	7,245.62
Unfunded Overcharges	6,209.99
Ticket Redemption Fund and Draft Account—Items Cancelled	3,461.88
Miscellaneous Items	713.89
Total	$9,576,582.65"

390 (7) The defendants next introduced in evidence the income Account, so headed from said last mentioned report covering the year 1915:

"Income Account.

Operating revenue:	
Freight Revenue	$6,742,801.47
Passenger Revenue	1,682,213.94
Mail Revenue	246,373.74
Express Revenue	181,999.98
All other Transportation Revenue	119,924.64
Revenue from Operations other than Transportation	119,586.21
Total Operating Revenue	$9,092,899.98
Operating expenses:	
Maintenance of Way and Structures	$1,491,913.09
Maintenance of Equipment	1,576,679.75
Traffic Expenses	250,135.76
Miscellaneous Operation	39,026.30
Conducting Transportation	3,886,924.54
Transportation for Investment—Cr.	114,428.87
General Expenses	355,462.36
Total Operating Expenses	7,485,712.93
Income from Operation	1,607,187.05
Income from other Sources	483,682.67
Total Income	2,090,869.72
Deductions from Income:	
Taxes	419,090.44
Interest on Bonds—accrued	1,295,037.33
Interest on Defaulted Interest on Bonds	35,125.17
Interest on Bills Payable	8,381.19
Interest on Receiver's Certificates	17,129.25
Interest on Car Trust Notes	49,646.66
Hire of Equipment	927,845.63
Additions and Betterments	.....
Other Deductions	129,660.57
Total Deductions	2,881,916.24
Net Income for the Year (Deficit)	791,046.52"

(8) Defendants next introduced in evidence report of the I. & G. N. Ry. Co. to the State Tax Board filed the 14th of March, 1913 with respect to rolling stock, that is, that portion of said report which dealt with rolling stock, of which the following is a true copy:

391 *The Assessed Value and Also the True Value of All the Rolling-stock Owned by Said Company and Apportioned by the Comptroller to Each of the Counties of the State in Which Said Road is Operated.*

Name of county.	Mileage.	Assessed value of rolling stock apportioned to each county as rendered for 1912.	Actual value of rolling stock to which county is entitled.	Remarks.
Anderson	48.54	$72,230	$72,230	
Atascosa	1.39	2,070	2,070	
Brazos	38.40	57,142	57,142	
Bexar	39.33	58,525	58,525	
Brazoria	26.58	39,553	39,553	
Cherokee	28.98	43,120	43,120	
Comal	24.89	37,038	37,038	
Ellis	28.27	42,065	42,065	
Freestone	2.67	3,975	3,975	
Frio	34.54	51,398	51,398	
Fort Bend	10.37	15,430	15,430	
Falls	32.71	48,670	48,670	
Gregg	14.22	21,160	21,160	
Grimes	61.79	91,947	91,947	
Hays	24.31	36,179	36,179	
Houston	36.31	54,030	54,030	
Harris	61.46	72,761	72,761	

Assessed and True Values.—Continued.

Name of county.	Mileage.	Assessed value of rolling stock apportioned to each county as rendered for 1912.	Actual value of rolling stock to which county is entitled.	Remarks.
Hill	21.89	32,570	32,570	
Johnson	14.43	21,470	21,470	
Leon	45.04	67,020	67,020	
La Salle	44.31	65,936	65,936	
Madison	6.70	9,970	9,970	
Milam	37.39	55,639	55,639	
Medina	13.74	20,446	20,446	
Montgomery	40.00	59,520	59,520	
McLennan	37.58	55,920	55,920	
Navarro	.02	30	30	
Rusk	25.45	37,870	37,870	
Robertson	73.14	108,840	108,840	
Smith	52.68	78,391	78,391	
Travis	27.33	40,670	40,670	
Trinity	15.86	23,601	23,601	
Tarrant	14.82	22,052	22,053	
Wood	4.88	7,262	7,262	
Walker	33.41	49,715	49,715	

Williamson	42.86	63,600	63,600	
Waller	1.78	2,649	2,649	
Webb	37.95	56,472	56,472	
Total of I. & G. N.	1,106.00	$1,626,937	$1,626,937	
Galveston	26.00	38,690	38,690	Joint Trackage with G. H. & H. & M. K. & T.
Harris	22.83	37,489	37,489	
	1,154.83	$1,703,116	$1,703,116	
Additional rolling stock allowed but not distributed according to counties			$1,218,907	
			$2,922,023	

392 (9) The defendants next offered in evidence certain excerpts from a brief which were admitted in evidence over the objection and exception of the plaintiffs. This brief was signed by Henry W. Anderson and Wilson Dabney & King as attorneys for the I. & G. N. Ry. Co. and was presented to the Attorney General of the State of Texas in the year 1913. The first of these excerpts was the Statement of Facts contained in the brief, and the other excerpts are excerpts from the argument contained in this brief. This brief is entitled "Before the Honorable Attorney General of the State of Texas," and states that the Railroad Commission had requested the Attorney General to give an opinion as to the validity of certain conditional interim certificates. The brief was accordingly presented to the Attorney General of date February 3, 1913. The Statement of Facts in this brief is as follows:

"Statement of Facts.

"Prior to the year 1908, the International and Great Northern Railroad Company was a railroad corporation existing under the laws of the State of Texas, owning and operating approximately 1,106 miles of railroad, with trackage rights upon approximately 53.5 miles of additional railway, making a total mileage of 1,159.5 miles, all of which was located in said State.

On November 1, 1879, the Railroad Company executed its bonds in the sum of $11,291,000, bearing interest at six per cent and at the same time executed a mortgage to Kennedy and Sloan, as Trustees, to secure said bonds. All of these bonds are still outstanding, and said mortgage is herein referred to as the First Mortgage.

On June 15, 1881, the Railroad Company executed a second mortgage deed of trust to the Farmers Loan and Trust Company, as Trustee, to secure an issue of $10,391,000 of five per cent bonds maturing on September 1, 1909. Said mortgage is herein referred to as the Second Mortgage.

On March 1, 1892, the Railroad Company executed a third mortgage to the Mercantile Trust Company, as Trustee, to secure
393 an issue of $2,966,052.50 of Third Mortgage Four Per Cent Bonds maturing in the year 1921. Said Mortgage is herein referred to as the Third Mortgage.

On February 27, 1908, the Railroad Company having defaulted in the payment of certain obligations, a judgment was obtained against the Company, and a Bill of Equity was filed in the Circuit Court of the United States for the Northern District of Texas, against the International and Great Northern Railroad Company and others, praying, among other things the appointment of a Receiver to take charge of the property and assets of said railroad, and to operate the same under directions of the Court, the marshaling of its assets, and the enforcement of the judgment liens upon which said Bill was brought.

Thereafter, default having been made in the instalment of interest due upon the Second Mortgage Bonds secured by the mortgage deed of trust to the Farmers Loan and Trust Company as Trustee, afore-

said, said bonds became by their terms and in the manner prescribed by said mortgage due and payable, and said Trustee filed its Bill in the said Circuit Court of the United States for the Northern District of Texas, to foreclose said mortgage and enforce the lien thereof for the benefit of the bondholders secured thereby.

Subsequently, default having also been made in the payment of an instalment of interest falling due on the Third Mortgage Bonds secured by mortgage deed of trust to the Mercantile Trust Company as Trustee, as aforesaid, said bonds became due and payable in the manner prescribed in said mortgage, and a Bill was filed by said Trustee in the Circuit Court of the United States for the Northern District of Texas, to foreclose said mortgage and enforce the lien thereof for the benefit of the holders of the bonds secured thereby.

All of these suits were subsequently consolidated and heard together in the Circuit Court of the United States for the
394 Northern District of Texas, and similar ancillary suits were brought in the Circuit Courts of the United States for the Southern District of Texas, the Eastern District of Texas and the Western District of Texas, in each of which districts portions of the mortgaged property and premises were situated. Proper proceedings having been had in said courts to that end, on the 10th day of May, 1910, a decree of foreclosure and sale was entered by the Circuit Court of the United States for the Northern District of Texas, and subsequently adopted, entered and pronounced as the decree of said other courts in said ancillary causes, whereby a foreclosure of said Second Mortgage was ordered, and in default of the payment of the amount of the principal and interest due thereunder, a sale of the mortgaged property, premises and franchises of the International & Great Northern Railroad Company, to satisfy the bonds and interest coupons secured by said mortgage, as provided in said decree.

Said sale was postponed, from time to time, and finally the property and franchises of the International and Great Northern Railroad Company were, after due notice, sold at public auction by William H. Flippen, Special Master of said Court, on the 13th day of June, 1911.

On May 16th, 1911, about one month prior to the sale of the property, under the Second Mortgage, the indebtedness and capitalization of the International & Great Northern Railroad Company was approximately as follows:

I. Bonds and Obligations not in Default.

First Mortgage Six Per Cent Bonds	$11,291,000.00
Colorado Bridge Seven Per Cent Bonds	198,000.00
San Antonio Station Loan	42,000.00
Equipment Obligations	392,650.00
Receiver's Equipment Notes	276,000.00
Total	$12,199,650.00

II. Bonds in Default.

Second Mortgage Bonds:		
Principal	$10,391,000.00	
Interest to May 16, 1911	2,516,643.88	
		12,907,643.88
395 Third Mortgage Bonds:		
Principal	$2,961,000.00	
Interest to May 16, 1911	937,004.00	
Scrip	5,052.50	
		3,903,056.50
III. Judgments and floating debt		5,513,600.00
IV. Unpaid vouchers prior to receivership, having priority over mortgages, under the Texas law		1,321,463.00
Total Indebtedness		$35,845,413.38
Capital Stock		9,755,000.00
Total Capitalization		$45,600,413.38

This indebtedness was exclusive of any current indebtedness of the Receiver, and the costs and expenses of the litigation, which had to be paid in the reorganization of the property, which with accrued interest to the date of sale made the indebtedness of the company at the time of foreclosure in excess of $36,000,000.

Under a statute of Texas, passed while the property was in the hands of a receiver, a large amount of the current indebtedness of the Company which accrued prior to the date of the receivership, and of the Receiver, during the period of his operations, was made a charge upon the property in the hands of any purchaser, and any provision for the reorganization of the property must take into consideration not only the mortgage debts but the statutory liens and charges as well.

Under these conditions, with the property being advertised for sale, it became necessary for the Third Mortgage Bondholders to take some steps to protect their interests and to acquire the property at the foreclosure sale.

Prior to this date the Third Mortgage Bondholders had formed a protective committee, with which substantially all of these bonds were deposited. The Committee, acting on behalf of the Third Mortgage Bondholders, arranged to purchase substantially all of the Second Mortgage Bonds, paying therefor the principal of said bonds, with interest to the date of said purchase, and all compensation and expenses of the Trustee and its counsel, including the expenses of the litigation and the foreclosure of said mortgage.

396 The Committee of Third Mortgage Bondholders then formulated a plan of reorganization of the property, dated

May 9, 1911, in which plan the stock of the company, which under the Texas law was cancelled by the foreclosure sale, was entirely disregarded. Provision was made for the issue and disposition of $11,000,000 of Three-Year Five Per cent Gold Notes secured by the pledge of $13,750,000 of new First Refunding Mortgage Bonds of the reorganized company; for the sale of $3,400,000 of preferred stock and $6,500,000 of common stock. The underlying liens upon the property, subject to which it was to be sold, were as follows:

First Mortgage Bonds.....	$11,291,000.00	
Colorado Bridge Bonds.....	198,000.00	
San Antonio Station Loan.....	42,000.00	
Total		$11,531,000.00

It was proposed by the reorganization plan to issue additional securities as follows:

First Refunding Mortgage Bonds, pledged as collateral for $11,000,000 of Notes.....	$13,750,000.00	
Preferred Stock	3,400,000.00	
Common Stock	6,500,000.00	
		$23,650,000.00
		$35,181,000.00

So that the total amount of securities of all classes proposed by the plan to be outstanding upon the property, if purchased by the Reorganization Committee, was less than the outstanding indebtedness at the time of the sale.

The issue and sale of $11,000,000 of Three-Year Five Per Cent Notes, secured by First Refunding Mortgage Bonds as collateral, was made necessary by the fact that it was impossible for the Committee to arrange to sell the bonds of the new company, under the then existing conditions, or until the reorganized property had demonstrated its earning capacity.

Of the $13,750,000 of bonds pledged as collateral for these Notes, it was provided that $1,600,000 thereof should be converted into preferred stock, when the Notes were paid, thus reducing the funded debt of the company by that amount; so that it was con-
397 templated, as the result of the reorganization plan if carried into effect, and upon the payment of the $11,000,000 of Notes, that the funded debt of the company would be $26,639,000, which was being reduced by the payment of the San Antonio Station Loan in annual instalments, while the outstanding capital stock would be $5,000,000 of preferred stock, and $6,500,000 of common stock, making a total of $35,139,000 of capitalization upon a property which then had actual indebtedness prior to the sale in excess of $36,000,000, and had demonstrated by its earnings, in operation by the receiver, a value in excess of that amount.

It was recognized, of course, that the actual issue of securities would have to be limited by the valuation placed upon the reorganized property by the Railroad Commission of Texas, as provided by the laws of that State, but it was anticipated that this valuation would equal at least the total amount of the securities thus proposed to be issued, and it was impossible to get the security holders together or effect a reorganization of the property, so desirable from the standpoint of the public as well as of the company, upon a basis less advantageous to the interests of the various securities, since it was necessary to provide in new cash not only the amount of the Second Mortgage Bonds, but a sufficient amount in addition to pay the statutory liens and charges upon the property, and the costs and expenses of the litigation, and give to the new company an adequate working capital.

By the plan the capitalization of the company was actually reduced by more than $10,000,000, and over $11,000,000 of the remaining capitalization which had been represented by funded debt or statutory liens or charges was converted into stock. Not only the old stock but a large amount of judgment and other indebtedness of the old Company was absolutely wiped out by the sale.

In addition to making provision for the payment of statutory liens and other indebtedness, except the mortgage indebtedness subject to which the property was being sold, and the old equip-
398 ment obligations of the company, it was recognized that in order to render effecient service and produce the best results it would be necessary to expend upon the property approximately $1,000,000 per annum for a period of three years, and in order to provide this money the Committee, as a part of the plan, perfected an agreement with a syndicate of bankers to purchase $1,000,000 of First Refunding Mortgage Bonds of the new company, to be issued as provided in the plan, each year for three years, or a total of $3,000,000 of said bonds, the proceeds of which were to be applied to the improvement of the property.

This reorganization plan having been promulgated and accepted by substantially all of the bondholders, and arrangements having been made for the sale of the new securities to a sufficient extent to provide the cash necessary for the purposes aforesaid, the Committee, through its representative, Frank C. Nicodemus, Jr., purchased the property and franchises of the International and Great Northern Railroad Company, at the foreclosure sale under the decree of the Circuit Court of the United States for the Northern District of Texas, on June 13, 1911. He being the only bidder at the sale, only a nominal bid was made as it was unnecessary to bid beyond that amount, although they held substantially all the securities with which to make payment for the property.

Frank C. Nicodemus, Jr., acting for the Committee, having thus become the owner of the property and franchises of the railroad, steps were taken to organize a new company under the name of International and Great Northern Railway Company, pursuant to the laws of the State of Texas, with an authorized capital of 50,000 shares of preferred stock, of an aggregate par value of $5,000,000; and

65,000 shares of common stock, of an aggregate par value of $6,500,000.

This company having been duly organized, and stock to the amount of one thousand dollars per mile having been duly subscribed by Frank C. Nicodemus, Jr., and paid for in cash at the par value thereof, an agreement was entered into between the
399 new company and Frank C. Nicodemus, Jr., representing the Bondholders' Committee, and as such owners of the property, which was substantially to the following effect:

Nicodemus, representing the Third Mortgage Bondholders, the owners of the property, agreed to complete the payment of the purchase price of the property; to pay all the equipment obligations of the old company, or provide money for that purpose; to deliver at least $10,336,500 of the old Second Mortgage Bonds, stamped to show the payment of their proportion of the purchase price thereof; to pay to the Company a sufficient amount in cash to discharge the statutory liens and charges on the property under the laws of the State of Texas, estimated at $1,321,463; to subscribe to the remainder of the preferred and common stock of the company, as provided by the plan; to provide $1,600,000 of First Refunding Mortgage Bonds to be pledged as part collateral for the proposed issue of $11,000,000 of Notes, and to be converted into preferred stock upon the payment of said Notes; and to deliver to the company a binding and effective agreement for the purchase from the company of $1,000,000 of First Refunding Mortgage Bonds, in each year for three years, or a total of $3,000,000 of said bonds, the proceeds of which should be used for the improvement of the property to the high degree of efficiency required for the most effective operation and the rendering of an efficient public service.

In consideration of the above the Company agreed to deliver to Nicodemus, in payment for the property and other considerations named, the following securities:

$11,000,000 par value of its Three-Year Five Per Cent Gold Notes;

1,600,000 par value of First Refunding Mortgage Bonds, to be pledged as part collateral for the Notes, and converted into preferred stock at par, on payment of the Notes;

1,110,900 par value of Preferred Stock, which together with the amount of the Preferred Stock already subscribed in the organization of the Company made a total of $3,400,000 of Preferred Stock;

Such further amount of Common stock as the Company might be authorized by law, or permitted to issue,
400 which it was contemplated would be $6,500,000, as provided in the reorganization plan upon the faith of which the bondholders had assented to the plan.

Stated briefly the effect of the transaction was that Nicodemus agreed to turn over the property purchased and owned by him as the agent of the Third Mortgage Bondholders' Committee, subject only to the prior mortgage liens aggregating $11,489,000 together, with cash sufficient to discharge the statutory liens upon the property and the costs and expenses of the litigation, as well as a contract for the purchase of $3,000,000 of bonds at the rate of $1,000,000 a year, to provide for the necessary improvements; in consideration of $11,000,000 of Notes, $1,600,000 of bonds, $3,400,000 of preferred stock, and $6,500,000 of common stock.

This arrangement having been made the new company applied to the Railroad Commission of Texas for a valuation upon its property, to enable it to issue the securities called for by the plant. After a hearing, the Commission by an order of September 27th, 1911, valued the property, rights and franchises of International and Great Northern Railway Company at an amount, in the aggregate, equal to the sum of $30,365,047.97, "subject to such additions, if any, as shall result from an examination now being made by the Railroad Commission of Texas as to certain real estate which it is claimed was omitted in the original valuation of said International and Great Northern Railroad property". The final valuation to be placed upon the property was, therefore, left open to be fixed definitely upon further investigation as to the real estate claimed to have been omitted.

The Railroad Commission had required, as a condition precedent to making any valuation of the property, that payments therefor should be made and title vested in the new Company, so that it became necessary to immediately issue the new securities up to the amount of the valuation without awaiting the final valuation as to the reserved items. Under these condition the Company arranged to issue forthwith the bonds to the amount of $13,750,000, of
401 which $12,150,000 par value were to be pledged as collateral for the Three-Year Five Per Cent Notes, and $1,600,000 par value were to be delivered to Nicodemus in part payment for the purchase price, to be in turn pledged by him as part collateral for the Three-Year Five Per Cent Notes, making a total of $13,750,000 of bonds required as collateral for said Notes. This having been done, the Company arranged to issue said Notes and deliver the same to Nicodemus in part payment of the property, and also to deliver to him stock up to the aggregate of $3,400,000 of preferred stock, called for by the plan, and $1,422,000 of common stock, which was the maximum amount of said last named stock, which was permitted then to be issued by the preliminary valuation of the Commission aforesaid.

The Railway Company advised Nicodemus of the conditions with respect to the valuation of the property which made it possible for the Company to deliver to him, at that time, the full amount of $6,500,000 of common stock authorized by the Articles of Association, and contemplated by the Plan. It, therefore, proposed that he should accept on behalf of the Bondholders' Committee, as owners of the property, $1,422,000 of common stock, which could then be issued

on the valuation placed upon the property by the Commission, and in lieu of the remaining common stock called for by the plan there should be issued to him Conditional Interim Certificates, entitling the holders thereof to receive "if, as and when the same is authorized by law to be issued and is issued," $5,078,000 par value of common stock, such certificates to be issued under the terms of an agreement between the Railway Company and the holders of said certificates, dated the 7th day of November, 1911—a copy of which is filed herewith.

This proposition having been accepted by Nicodemus, on behalf of the Reorganization Committee, the execution of said agreement and the form thereof were approved by the unanimous action
402 of the Board of Directors and the Stockholders of said Company, all of the outstanding stock, both preferred and common, being represented, at meetings thereof duly held at Houston, Texas, on the 7th day of November, 1911; and the agreement was thereupon executed by the Company, and Conditional Interim Certificates to the amount aforesaid issued and delivered to said Frank C. Nicodemus, Jr., representing the Bondholders' Committee from whom the property had been acquired by the Railway Company.

By the terms of this agreement it was recited that the Railway Company had made application to the Railroad Commission of Texas for a valuation upon the property, and had submitted statements showing a valuation of said property and franchises in excess of the aggregate amount of outstanding bonds and obligations secured by the lien upon the property, and the total amount of capital stock authorized by the Articles of Incorporation, including the full amount of $6,500,000 of common stock; that the Railroad Commission had, up to that time, declined to take into account certain elements of value considered by the Railway Company as entitled to consideration in determining the value of the property and franchises, and, after disallowing these elements of value, had placed a valuation upon the property of $30,365,047.97, "subject to such additions, if any, as may result from an examination now being made by said Railroad Commission as to certain real estate claimed to have been omitted from such valuation"; and recited the other facts leading up to the making of the agreement, as hereinbefore set forth. It then provided for the issue of the Conditional Interim Certificates, entitling the holders thereof to receive, "if, as and when the same is authorized by law to be issued and is issued, but not before," shares of the common stock of the Company, to the amount authorized by the Articles of Incorporation but unissued at the date of the certificate, as stated in the face thereof, said certificate being in the following form:

403 "International and Great Northern Railway Company.

No. —. — Shares.

Incorporated under the Laws of the State of Texas.

Conditional Interim Certificate.

This certifies that —— —— is entitled to receive, if, as and when the same is authorized by law to be issued and is issued, but not before — shares of the common stock of the Company out of the amount of said common stock authorized by the Articles of Incorporation of the Company but unissued at the date of this certificate.

Until the redemption of this certificate, as hereinafter provided, the holder thereof is entitled to receive, from time to time, as and when dividends are declared and paid upon the common stock of the Company then outstanding, sums of money by way of interest upon the par amount of the common stock expressed upon the face of this certificate, at the same rate as the rate of dividends so declared and paid upon the outstanding common stock of the Company.

This certificate is transferable, in person or by attorney, on books kept by the Company for that purpose, upon surrender of this certificate properly endorsed. The holder of this certificate is not entitled to vote at any regular or special meeting of stockholders, nor to exercise any other rights of stockholders of the Company. This certificate is one of a series of certificates authorized by unanimous action of the entire Board of Directors and of all the stockholders of the Company, at meetings duly held, and is issued under an agreement, dated November 7, 1911, executed by International and Great Northern Railway Company, to which agreement all holders of certificates of this issue, by the acceptance thereof, become parties.

All or any part of the certificates of this issue may be re-
404 deemed by the Company, in the manner and upon the terms set forth in the above-mentioned agreement, by the issue and delivery to the registered owners of the certificates so redeemed of a par amount of common stock of the Company equal to the amount of said common stock expressed upon the face of the certificates so redeemed.

In witness whereof, International and Great Northern Railway Company has caused this certificate to be signed by its President or one of its Vice-Presidents, and its corporate seal to be hereto affixed, attested by its Secretary or one of its Assistant Secretaries, this — day of ——, ——.

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY,

By —— ——,
President.

Attest:

—— ——,
Secretary."

By section 1 of the agreement it is provided as follows:

"1. The Conditional Interim Certificates to be issued under this agreement shall entitle the holders thereof to receive, *if, as and when the same is authorized by law to be issued and is issued by the Railway Company, but not before,* — shares of the common stock of the Railway Company authorized by its Articles of Incorporation but remaining unissued at the time of the execution of this agreement, amounting in the aggregate to $5,078,000 par value thereof, but the Certificate holders *shall not be entitled to vote in respect of said stock* at any regular or special meeting of the stockholders of the Railway Company, *nor to exercise any rights* of stockholders, prior to the actual issue thereof, and shall *not be entitled to any lien or charge upon the railroads, property and franchises of the Railway Company.* All Conditional Interim Certificates to be issued under this agreement shall forthwith, upon the execution of this agreement, be executed by the proper officers of the Railway Company and be issued in such manner as may be authorized by its Board of Directors." (Italics ours.)

405 By section 5 of the agreement the obligation of the Railway Company to issue stock against the said certificates is limited to such additional stock of the Railway Company — *may be authorized by law to issue in respect to the railroad property and franchises at that time owned by the Railway Company, exclusive of betterments and improvements thereon,* but the Railway Company reserved the right *in its discretion* to apply such additional amounts of common stock as it might be authorized by law to issue against such additions or improvements, to the redemption of said certificates.

In the Agreement and in the face of the Certificate it is provided that the holder of the certificate shall be entitled to receive, from time to time, as and when dividends are declared and paid on the common stock of the company then outstanding, "sums of money by way of interest upon the par amount of the common stock expressed upon the face of the Certificate, at the same rate as the rate of dividend so declared and paid upon the outstanding common stock of the Company."

The other provisions of the Agreement will be seen by reference thereto.

The question has been submitted to the Honorable Attorney-General as to whether the Condition- Interim Certificates issued under the circumstances, in the manner and for the purposes aforesaid, are valid under the laws of the State of Texas."

The excerpts from the Argument introduced in evidence are as follows:

"On the other question, as to the consideration moving to the company, we submit that the record in this case fully discloses an adequate consideration within the meaning of the law as defined and construed by the Texas courts.

When the Reorganization Plan was prepared and promulgated, the International and Great Northern Railroad property and franchises were advertised for sale. The second mortgage bonds and

third mortgage bonds, aggregating in principal and interest
406 about $17,000,000 were due and payable. Substantially all of these bonds were controlled by the Reorganization Committee, which was thus in a position to bid the entire amount of these bonds for the property sold subject to the underlying liens aggregating $11,531,000. It was also necessary, in order to pay off the liens created on the property by the statutes of Texas, and other charges incident to the reorganization, and to provide an adequate working capital, that there should be raised sufficient cash for these purposes. The holders of the bonds purchased the property at the foreclosure sale, made arrangements to raise the money required by the reorganization, and then agreed to convey this railroad as a going concer-, earning in excess of $9,000,000 per annum, to the new company, subject only to the underlying mortgage liens of $11,531,000, in consideration of $11,000,000 of notes, $1,600,000 of bonds, $3,400,000 of its preferred stock, and $6,500,000 of its common stock, making an aggregate of $22,500,000 of new securities including the stock now represented by Conditional Interim Certificates.

The Reorganization Committee owned this railroad, with its valuable franchises and with a present earning capacity of over $9,000,000 per annum. They conveyed the same to the railway company, subject only to $11,531,000 of underlying indebtedness, turned over to the company all cash and current assets of the Receiver, and several hundred thousand dollars of working capital, in consideration of the securities aggregating $22,500,000 par value, including the Interim Certificates.

The decisions which have been cited show that the courts have unanimously held that a purchaser of a railroad, under such conditions, can sell the same for its value. It certainly could not be seriously contended that the property thus conveyed and delivered to the new company did not represent a fair and adequate consideration for the securities issued, aggregating $22,500,000 par value,
and that is all that is required by the Texas laws, as construed
407 by the Texas courts."

* * * * * * *

"Without going further into an analysis of these features of the reorganization Plan, which are set forth at length in the Statement of Facts herein, it is respectfully submitted that the consideration given by the Reorganization Committee to the new company, for its securities, including the proposed issue of $6,500,000 of common stock, a part of which is now represented by the Conditional Interim Certificates, was not only a valuable and adequate consideration for all the securities, including the Conditional Interim Certificates, but exceeded in actual present value the par value of such securities."

* * * * * * *

"In other words, if the company could have issued all of its common stock at the time, it would have been supported by an abundant and valuable consideration as between the stockholders.

and the company, to meet the provisions of the Texas law as construed by the highest courts of that State."

* * * * * * *

"That even if we consider the question of consideration as being now before us, yet the consideration given to the company by the Reorganization Committee under the Plan of Reorganization was adequate and abundant as between the company and its stockholders, to sustain the issue of the entire $6,500,000 of stock provided by the Articles of Incorporation in accordance with the laws of Texas as construed by its highest courts.

That the company *having* received from the Reorganization Committee this consideration, having a present actual value in property and cash adequate to sustain the issue of all the common stock authorized by its Articles of Incorporation, including that represented by the Conditional Interim Certificates."

408 (10) The defendants next introduced in evidence a statement of the intangible values of the various railroads of the State of Texas as found by the State Tax Board for the years 1914 and 1915, which table of intangible values are as follows:

"Intangible Value.

	1914.	1915.
"Abilene & Southern Ry. Co.....	$113,668	$158,906
Beaumont, Sour Lake & Western.....	.....	500,000
Chicago, Rock Island & Gulf.....	3,958,875	3,632,850
Denison & Pacific Surburban.....	50,000	50,000
El Paso & Northeastern.....	576,000	50,050
El Paso Southern Ry. Co.....	14,723	11,000
El Paso Southwestern.....	187,600	750,000
Ft. Worth & Denver City.....	9,991,080	9,764,010
Ft. Worth & Rio Grande	331,155	441,540
Galveston, Harrisburg & San Antonio...	25,297,360	25,629,200
Galveston, Houston & Henderson.....	620,023	392,839
Groveton, Lufkin & Northern.....	.....	20,000
Gulf, Colo. & Santa Fe and Leased Lines.	19,469,592	22,565,622
Cane Belt R. R. Co.		
Concho, San Saba & Llano Valley.		
Gulf, Beaumont & Great Northern.		
Gulf, Beaumont & Kansas City.		
Gulf & Interstate.		
Jasper & Eastern.		
Texas & Gulf.		
Houston East & West Texas.....	2,291,400	2,227,055
Houston & Brazos Valley.....	.....	100,000
Houston & Texas Central.....	12,400,650	12,989,008
Herne & Brazos Valley.....	20,840	(Belongs to H. & T. C.)

	1914.	1915.
International & Frt. Northern	14,488,600	10,743,223
Kansas City, Mexico & Orient	.....	500,000
Marshall & East Texas	50,000	36,204
Missouri, Kansas & Texas Ry. Co. and Leased Lines	19,629,750	20,144,490
Beaumont & Grt. Northern	52,845	
Texas Central	900,000	
Dallas, Cleburne & Southwestern	.....	
Denison, Bonham & New Orleans	.....	
Wichita Falls Ry Co.	718,400	
Wichita Falls & Northwestern	495,900	
Wichita Falls & Southern	.....	
Wichita Falls & Wellington	.....	
Missouri, Oklahoma & Gulf	20,490	21,840
Paris & Great Northern	647,200	915,788
Paris & Mt. Pleasant	76,980	302,788
Panhandle & Santa Fe	2,248,560	2,248,560
Pecos & Northern Texas	2,416,777	3,109,095
Quanah, Acme & Pacific	236,580	236,760
Rio Grande & Eagle Pass	200,000	200,000
Rio Grande, El Paso & Santa Fe	202,200	378,114
San Antonio & Aransas Pass	7,238,000	5,862,780
Shreveport, Houston & Gulf	25,000	25,000
Stephenville North & South Texas	210,360	105,180
St. Louis, Brownsville & Mexico	236,845	253,030
St. Louis Southwestern	4,866,470	3,823,655
Sugar Land Ry Co.	200,000	135,000
Texarkana & Ft. Smith	3,244,000	2,019,390
Texas Mexican	.....	250,000
Texas Midland	554,000	711,189
Texas & New Orleans	7,002,280	7,000,964
Texas & Pacific	20,117,955	19,717,189
Texas Short Line	35,100	28,083
Trinity & Brazos Valley	302,820	.....
409 Trinity Valley Southern	$10,000	9,600
Weatherford, Mineral Wells & N. W.	246,000	118,900
Wichita Valley Ry. Co. and Leased Lines	768,000	1,045,380
Brownsville Ferry Co.	10,000	10,000
Laredo Bridge Co.	40,000	40,000
Porfirio, Diax & Eagle Pass Bridge Co.	43,833	43,833
	.....	

(11) The defendants next called W. H. WARD, who being duly sworn, as all other witnesses were, testified, as follows:

The witness stated that he is County Judge of Harris County and has been for three years, and serving during that period on the Board of Equalization.

That the land values in Harris County, striking out those which are not urban, are very difficult to determine with any approxima-

tion to real values, and that it has been "our intention to establish, as far as possible, to get at the exact value, eliminating speculation or speculative prices on both rural and city lands," trying to assess it around its true value, as far as possible, taking in consideration that the rural lands, or the larger portion of them, have no real value on a basis of what returns can be obtained from it, at least up to the present time, and that there is very little return from these lands, except for stock raising purposes. That he is fairly acquainted with the county and its lands, and has been over them quite a bit. That a man can almost always find a purchaser for anything he has to sell, if he makes low enough prices to get some one to think that it is speculatively good, and that most of the county land has something of a market price, but that this depends, to a great extent, upon its location. In some locations the witness thought this would be absolutely speculative, in others that the land might have a real price. That in a general way he was familiar with the actual values and knew something about what people considered the lands worth when sold, and that he was fairly familiar with the productiveness of the soil in Harris County, and that he knew, in a limited way, land in the county; had bought and sold land in the county in a limited way, and had frequently come in contact with the prices at which lands are often sold, in exercising his
410 function as Judge of the Probate Court, closing estates, passing on prices, and that he had come in touch with the opinions of different persons over the county in regard to land values. Over the objection and exception of the plaintiffs the witness testified:

That Harris County is quite large, and values in different parts of the County not uniform, and that his recollection was that the lands are assessed, to some extent, taking in- consideration their proximity or remoteness from Houston, and that property located in one School District might be a fair sample of what the property is worth in another school district, and that they are not so assessed according to his recollection or understanding, and that in fixing the values for taxation, the Board of Equalization tries in each instance to determine the true value of the property, and to so assess it for taxation, that this is true in this county, the city and the suburbs of the city, but that the county had, for a considerable number of years, until a short time back, been on a land boom and prices and sales had been out of proportion entirely to actual cash value, and that as far as they could do so, it was the intention of the Board to fix the actual values, squeezing the water out of the speculative values, it not being their intention to assess or make them too low, but to get at the actual value, and that this was the intention of the Board as to all property; that his statement was not confined to mere landed property, and that the same thing applied to the city as well as the county property. And that as far as the Board of Equalization could do so, assessments were made and attempted to be made at the true value, but that the Board had to arrive at it the best they could; that the assessments had been, in the witnesses' opinion, up to the time when the present Assessor took charge, in rather a chaotic state, and that the present Assessor has endeavored to get them in a better state by getting up a

statement of comparative land values and comparative improvement values; and that there had been no scheme that the witness knew of, to reduce the assessed values below what was conceived and understood to be the true value. The witness said that he was only
411 one member of the Board, but that the Board of Equalization had discussed that matter and that he had never heard the Board direct the Tax Assessor to assess the land at 66⅔% or less than its cash value, or if there is none, then its true value, and that he had never heard the Board of Equalization so instruct the Assessor, either as to land, or any other property.

The witness was next cross-examined by the plaintiffs and testified:

That it was his understanding that the Board had the same scheme and treated all property, personal or real estate, alike. They tried to arrive, as near as possible, at the correct valuation without favor to any class of property over other classes of property by giving it a lower assessment, the effort being to assess it all at its true value, either its cash market value, or its market value, and that the Board tried to treat everybody alike.

That as to bank stocks, the witness said personally he did not know whether or not they had a cash market value every day in the year; that he had never dealt in them, that he did not know that the First National Bank stock of Houston was assessed in 1915 at 50% of its market value, but that his recollection was, to the contrary, and that the banks and trust companies were assessed on a basis of about 70% of their capital, surplus and undivided profits, and that that was his recollection of the Board's instructions to the Assessors, that is, at 70% of their book value on the par, or 70% of the par of their capital stock, surplus and undivided profits. The witness said that he didn't know that this bank stock was selling at an enormous premium; that in 1914 the banks and trust companies came before the court which had a hearing, and that at that time it was determined that it was a fair way on an equalizing basis, to assess them at 70% of the book value, and that this would put them even with other taxpayers in the county. Here the defendants took an objection, which was overruled.

The witness said that this equalization of the bank stock was thought to make its assessment fair in relation to other tax payers in the county, and that by taking 70% of its book value the
412 assessment would correspond to the other assessed values of the taxpayers of the County, in a general way, and that this was the position of the Board.

The witness stated that he had lived in Houston about 30 years more or less, nearly all his life. When asked whether or not he knew that the bank stock of the First National Bank and the South Texas Commercial and others were at a premium in 1915, the witness answered that the statements gotten out by brokers show that most of the banks, usually the national banks, have ordinarily been above par, and some of the smaller banks ordinarily at par, and some below. That he would not state on positive knowledge and that this information is that some of it would have been considered

above par in 1915 and some below. That he possibly knew that as going money-making facilities, some of these banks would have a premium, and some might not; that he thought of one large Trust Company, and possibly another that might not, and that he had heard that some of them had been rather hard up for the last year or two. That the Board of Equalization did not feel it his duty to take each taxpayer separately according to what he had, and that this was not his advice, but that the Board tried to take taxpayers generally and assess them on a general basis, equalizing them as well as possible, and that as to the banks, he thought that they were taken on the book values and assessed on that basis, ignoring any premium they might have to the contrary; that his recollection was that the Board did not consider premiums on the stock, and that the Board did not let that go into the question of the actual value of these bank stocks, but just made a sweeping agreement to assess on the 70% basis, but that he did not mean to say that, taking the South Texas Commercial and the First National Bank as types, that it followed from what he said that the Board did not intend to assess their stocks at their true real market value; that taking the county as a whole and the city as a whole, the community had been for a number of years on a speculative basis, and that his opinion was
413 that the financial institutions and the real estate owners had been speculating and had lent money for speculation, and that taking up the county real estate values, this was considered in an effort to approximate the real value "and then cut it to about the basis that we have the other institutions." That taking the whole county the Board would inquire of the individual owners as to what they would hold their property at, and that the Board went through the equalization, as far as possible, in that way, and deducted about 30% of what they discussed as the values, as being the order of the values, and that is probably the reason that the Assessor, or some of his men, thought they had been instructed to do; that there had been no instructions to that effect, but in order to get the fictitious proportion of the value out, we have made the deductions as I say. That is the way we have handled it, and as far as possible, we have tried to equalize it that way; and that now coming back to the two banks mentioned, if the Board had not given these other people who lent the money to make speculations, the same advantages, these banks would not have been treated fairly in proportion to everybody else. But that he didn't think that the Board intended to conclude, or he himself intended to conclude, that the stock of the South Texas Commercial National Bank in 1915 was worth 30% less than its book value, or that that Bank, through speculations and bad loans, had depreciated its stock 70% below the book value, but that the 70% of the book value was taken in trying to equalize the banks with the other people in the county, and that he would make the same answers to the First National Bank, that they were trying to put everybody, as far as possible, on the actual basis and equalize the basis of taxation; that he did not consider that he was allowing land owners, or any of them, any particular margin; that he had a tract of 34 1/10 acres in the Rey-

nolds Survey which he considered worth $500.00 per acre, and would not take less today, but that an Italian truck grower next to him said he would sell his for $300.00 and that it was purely speculative, and that if he went to sell today, the chances were
414 that $200.00 would be all that he could get; that he presumed the Reynolds Survey was in School District 4, close to the City. That as to what he had assessed that tract for, he could not state, but thought it was done on the same basis with others in that vicinity, everything in the Reynolds being assessed up to a certain amount, nothing less than so much per acre. That one could readily see the difference between what was the speculative value and possibly the real value, but that he did not consider that par for the stock of the South Texas Commercial and the First National Bank would have been speculative in 1915, nor par on the book value, and that he presumed that it would have then sold for a great deal more, and that they had assessed it 30% below this value, which was not speculative, and tried to treat everybody in the county the same way, but the witness said that he did not think that it was a clear deduction, that the Board had a system of assessing everybody in the county below true value or non-speculative value; that he really did not know whether there was any speculative excess to the extent of 30% of the book value of these two banks, but that he did not think so, that the Board did not mean to assess land owners at par and the banks 30% below par on the book value, but tried, he thought, as far as possible, to get at the actual values, but that he did not say that the actual value of the South Texas Commercial Bank stock on Jany. 1st, 1915, was 70% of its book value; that he did not know that that was a fact.

The witness said he did not know whether cattle were assessed in 1915 throughout the county at $8.00, or whether assuming that to be the case, that was the true average value of these cattle, that is, of stock cattle. That he recollected no cattle case being called to the attention of the Board, that the Board accepted the assessments made in the Assessor's office, except values that had been called to their attention by the Assessor or property owner, and in some instances
others, particularly the School Districts would want values
415 raised. That the number of assessments which came before the Board and were individually examined by it, was a very small percentage of the whole. That if it be assumed that the Assessor had a system of valuing range cattle straight through at $8.00 per head, then the Board accepted that. That he did not know the value of range cattle in this county, and was not an expert on the values of land, but in a general way knew a good deal about land values which were dependent, to a large extent, upon what could be done with them. That our lands in 1911 and 1912 would have been considered probably more saleable, and in the La Porte district the witness's understanding was the values had ranged pretty high from 1909 to the present time, but that it was a question of finding a purchaser; that he examined titles for sales from $40.00 to $50.00 an acre, and that he understood that there was some for less.

That he did not know that this land was assessed at $15.00 to $16.00 per acre.

That he had a small tract near Hockley on the H. & T. C. Railroad, about 40 miles from Houston in Harris County, he got it in a law suit about six months ago, in a way as a fee and got it very reasonable because he had to locate it. It partly came as a fee and partly was paid for. That he thought that it was being held at $20.00 an acre by himself and associate, that it was average land, about ¾ of a mile South of Hockley.

That he did not know that the Assessors differentiated in different lands in the school districts, each school district was carried separately, and that the Assessors are not going on instructions from his office, if they have a system for a school district whereby they may take land at so much for this school district or a maximum or minimum, that he did not know whether or not they did that as a fact, but that the Board of Equalization did not consider school district lands in equalizing adjoining tracts. That Mr. Lidstone is a Deputy of Mr. Moody, the Assessor, and that the employment of all Deputies must be approved by the County Judge, and that Mr. Lidstone's deputation had been approved by him, but that he did not know about Lidstone's experience and had not investigated Lidstone's work, and that as far as he knew, the Board had not called
416 on Mr. Lidstone to give them his data for the purpose of equalization; that when the Board met, the Assessor Moody furnished any number of assistants which the Board might desire, but that he did not recollect whether Mr. Lidstone was one of them or whether Mr. Lidstone's idea was furnished.

The witness said that he considered the true value of land to be what it is actually worth as between parties who want to transact business on it, taking out any speculative value or enhanced value by reason of speculative holdings, and considering what the land might be used for. That he did not know what was the true value of his land near Hockley, and that his recollection was that the last piece of land he examined the title to in that vicinity was near Rose Hill and sold for about $10.00 an acre. That there might be German farms around Rose Hill worth $15.00 down or up, which would possibly be the true value, but that he did not know, he thought he had examined the title to a piece of land sold up there for $10.00 an acre in 1910 or 1915; that he did not know that there was no land in that district assessed at over $6.00 per acre and none under $5.00. That in a general way he would say that he did not know what was the true value of Harris County lands in 1915, but that in a general way the Board looked over these lands to determine their assessments, whether they were too high or too low. There is some land in the Rose Hill district probably worth $15.00, some might be worth more, the county is an enormous county and that he would not say that he is qualified to pass upon the absolute true values of any lands, except by comparison and investigation at the office at the time. But that the Board of Equalization had considerable data as to what the lands were held, bought and sold for, and considered that the true value, but not altogether the selling

price which was used as some criterion as a basis for judgment, that it was very difficult to arrive at values. That he thought the Camp place had been put in at $42,000.00 and that he had been told that it had been sold for $35,000.00, and so the Board reduced the valuations, that it ought to have been reduced below $35,000.00
417 to keep it on the proportion with the banks, but that it was not, but that the others were attempted to be got on a fair basis. He would not say just like the banks had been assessed, but that it could be put that way. That he did not know, as a fact, that the banks were assessed at 70% of their book value, but it was generally accepted among people here that it was a fact. That Mr. Blake, of the Assessor's office, or some one of that office, could probably figure out the exact proportion nearer than he could, but that he thought that it was not a large percentage of the assessments which were referred to the Board of equalization; that he remembered that the Board went over the Brunner Independent School District in its entirety.

That in determining whether or not true values were assessed, it was necessary to have some knowledge of what true values were in a general way. That he thought the Board had a fair knowledge of the true values in most of the school districts. That sales were something of a criterion, but that the files used by the Board were gotten up by Mr. Monahan, who was working directly with the Commissioners' Court, but that his statements were merely suggestive, but that Mr. Monahan did not advise the witness that the real values were those which the Commissioners' Court passed, nor did he give any advice, except that they had his statements before them, and would state what he thought the lands were worth in any particular locality; that the Board did not accept the price at which land was sold as its true value, but did not assess about 50% of the selling value. That what land sold for in Harris County for the last several years was not a criterion of value that the sellers might just happen to catch a sucker. That he would not regard the sales all over the county of any particular stated time as a guide. He did not know what was taken as the basis of true value in school district 6 in 1915.

That he owned 34 4/10 acres on the Reynolds Survey, School District 6, close to the City, for which he would not take less than $500.00, but an Italian next to him considers his worth
418 $300.00 an acre; that he considered it worth what it could be used for in 1915 as its true value, but that one could not eliminate the speculative proposition, and that the closer you got to the city the lands are speculatively worth more, but at the present time there is not a demand nor in 1915. The speculative value is the expectancy. That in 1915 he would not have taken less than $500.00 an acre for this land, but that you could buy land in that neighborhood for less. That he did not know what it was worth.

Here in connection with the witness's testimony, the assessment of this land owned by the witness in 1915 was put in evidence, it being assessed at $100.00 per acre. The witness's attention was then called to 8 acres owned by him on the Jacob Thomas Survey southwest of

Harrisburg, and through which the Interurban passes, and in School District 20, about one-half mile South of Brays Bayou, and probably some half mile away from the city boundary.

The witness said that he did not know exactly what it was worth in 1915. That he paid about $275.00 for about 40,000.00 square feet. That the rest he thought, did not value up to that; that he had bought this 40,000, less than an acre, in order to get at the road, that the 8 acres owned by him were undivided, that he did not know what its value was in 1915 and he did not think there was any market for it. Some had sold at $400.00 per acre he thought. It was here proved that this was assessed in 1915 at $1,050.00 for the whole 8 acres. The witness said that he did not make out the assessments, that all the assessments were made out by the Assessor, that he presumed that on the same lines as others in the community, and that if it had been different, it would have been turned over to the Board for adjustment. The assessment was signed by Monahan and that Monahan was his agent. That the witness was just taking the assessments on the basis of the Assessor's office and that it was his understanding of the proceeding, that there is a system which, in the Assessor's office, involves making out these assessments wholesale.

That they make it out on a basis of what they think in that
419 office is a proportionate basis, and that if a man accepts it it is all right, and if they don't they report it to the Commisssioners' Court. The witness said that this was his understanding, but that he would not testify positively, because he had not been down there during this assessing period, except to pass through and had not looked over their work, but that he assumed they were doing that. That his home was in Rossmoyne Addition, and that he traded for it and his recollection is, on the basis of $5,600.00 and some odd dollars. It was proved that this was rendered in 1915 for $2,600.00. The witness stated that he would not take $2,600.00 for it. When asked whether or not he considered $2,600.00 the true value for it, he answered he did not, and that he would not take $300.00 for his place valued by him at $500.00 per acre, and that he would not take less for his homestead than he had paid for it, and that he expected to get back what he paid for it, and that he considered it worth at least $5,000.00 at the time he acquired it.

That he had a lot and a half in Houston Heights unimproved on the second street back of the Boulevard, but did not remember what it cost him eight or ten years ago. That he had a lot in Empire Addition that he had paid at the times prices were good $1,425.00 or $1,475.00 for that lot and that it was rendered in 1915 at $800.00 for taxes, but that he had bought the lot to protect some of his relatives and the corner lot for $2,250.00, but would like to get out of these properties what it cost him. He thought that he had been stuck in acquiring them.

The witness stated generally as to his assessments that he presumed they were assessed on the general basis that other property was assessed at in the community, that he had made no effort at all to get any advantage of anybody, just told Monahan to go down and assess his property and there was no complaint made, that he did

not fail to assess any money, his recollection being that he had none, or loans. He did not know what the Scanlan Block and the Paul
Buildings were worth January 1st, 1915, but had some idea
420 of what the city property in general was worth, but was not
an expert. Had occasion to pass on the valuation of the Paul Building a few months ago in connection with the Shepherd Estate, having, as Probate Judge, to approve the purchase. That his recollection was that the property was taken over for a loan and that the purchaser paid, in addition, $30,000.00, and that for a half interest he approved the transaction as Probate Judge.

The witness stated that he did not know that the property in the City represented over 70% of the property on the tax rolls of the county, but that he had heard the opinion expressed that it represented from 75% to 90% but that he did not know. That he did not recollect that Lidstone was estimating that the assessments were not over 50% of the true values of real estate in the City. That the bulk of the assessments were passed just as the Assessor put them up without investigation, and the rolls were approved, unless the Assessor or some one else called attention to particular assessments.

The witness was reexamined by the defendants and testified as follows:

That he had a multitude of duties to perform, but worked with the Board of Equalization, that when he was through with the work of the Board it would pass out of his mind; that he made no attempt to carry 47,000 assessments of the county in his head. The witness said that he had never been down on the O'Brien Survey, which is perhaps in School District 11 South of Hockley. But that the most of the land in that part of the county was similar in character, but that he had been attempting to sell his land near Hockley at $20.00 per acre.

Here the Examiner stated to the witness that there was reported in the Daily Post a sale of 1095 2/10 acres in the O'Brien Survey at $7,501.00 or about $6.00 an acre and the witness stated that that illustrated that one man might hold his tract at a big price and an adjoining tract be bought at one-half, or a much lower price, and that gambling on the future one might hold up the price of land,
but being in a tight — for money he might let it down. That
421 he did not put a value upon 100 acres in the McKinstry Survey in the La Porte District reported as sold at $650.00.

As to the Reynolds Survey, that it runs down to the Rice Institute and was used for speculation, that there were nice houses on it and the witness had the 34.4 acre- on it, which he had said he would not take less than $500.00 per acre —.

Here the Examiner stated in evidence report of sheriff's sale in the Post of 6¼ acres in this survey made on March 10th for $320.00.

The witness then stated that the Middleton Survey is South of Addicks, about 16 miles from the City, and there was introduced in evidence from the Post report of a Sheriff's sale of 209 acres on it at $500.00.

Witness stated that he thought that these things illustrated the existence of speculative values and individual desires and personal

considerations at the present time, because very few people are willing to sell land at the present time unless they have to, as for instance, two lots on Main Street were sold for some $6,100.00.

The witness now stated that he had always considered that if the stock of a bank, has a premium or discount that would be reflected in the surplus and undivided profits, taking care of anything which might be above par, and that in equalizing the Board accepted bank stock at 70% of the book value.

That Railroad property had been almost uniformally accepted at the Railroads' renditions, that there was very little difficulty with the Railroads, only one or two instances could be recalled where they came before the Board, that the Railroads "have practically agreed that our assessments were correct and we submitted them and they have accepted them." And that the Railroad assessments had run about the same through a series of years and that there had been discussion with one Railroad year before last.

The witness said that he did not feel that he was in as good a position to determine railroad values, considering the peculiarities of the property, as he would be of ordinary property. That the railroad valuation would be more difficult in his opinion and that
422 he did not recall whether it was the I. & G. N. or the H. & T. C. with reference to which the little matter had been referred to the Board, but that was about two years ago. That it was the question of the valuation of their right of way, one or the other, but that he thought that it was Mr. Cunningham who came before the Board, Mr. Cunningham being the Tax Commissioner of the I. & G. N., but that the Board and the representatives of the Railroad had agreed, and that the Board was getting at these matters, referring to them as best it could from the standpoint of the real value of the property assessed.

Recross:

As to the oil property and the Humble property, the witness said that it was a must difficult thing to get at.

(12) J. W. CAMPBELL was called by the defendants, and testified on direct examination by them as follows:

That he had lived in the county 48 years and that the county was pretty well settled when he came to it. And that people had been coming and going and that he thought he had been on every league in the county and in ⅛ or ¼ of the lands outside of the City, but lived in the City. That he had farmed in the county for himself and father about 28 years, cultivating on an average about 65 acres. That there is not much in farming, very little in it, if you hire help, he used his own teams and tools, and thought he would do pretty well if he made $200.00 clear money per annum. That was all that there was in it for him, and that he had noticed many other folks farming, a great many came out at the small end, that the proportion of the land in Harris County actually cultivated outside of the City is so small that it is hard to estimate, he did not think over 15

or 20%, and that when he came to the county there was very little farming done and that the development during his residence in the county had been not over say 20%; that in some portions this side of Buffalo Bayou is good stock range; in the piney woods not good; good range was nearly ½, or say good and poor one-half, and half through the county. That the good range would take about
423 five acres to the cow without feeding in Winter, and poor range about 7, and that 100 acres of the best grazing land would run about 20 cows the year round in good shape, producing 12 or 14 calves, of which the stock men might market 8. That the cattle in the county were not such low grade, varied in different sections, a great many from Florida, little dried up cattle, hardly as big as a dogie, and they are called goats. That he thought that there were more good cattle in the county than small cattle. That these small cattle sold in 1915 for about $20.00 a head and the best in 1915, range cattle, about $35.00. That 20 cows on a 100 acre pasture would make an investment, in addition to the land, of $700 producing 8 calves brought to the market, which would have sold in 1915 for $15.00 each, or bringing together about $120.00. That the cows would dec-ease in value with each year, and that they would have to be looked after, which took considerable time. That he had allowed nothing for deaths of cattle. That for stock purposes, taking the best grazing land in the county, it would not be worth over $8.00 an acre, and that plenty of the second-class land in the county for grazing purposes, would not be worth $5.00 per acre. That this second-rate land was not used by the farmers, except newcomers, that a man could not make anything farming on land if he bought land and put it in cultivation and paid over $30.00 an acre for the best. That there is a gread deal of land in the County which won't produce anything, that he has known lots of it to fail,—Down around Deer Park in that section, and over towards Genoa and a great many different places. That many farms have to be fertilized. That some of it could be used for gardening, excluding the oil proposition, and that there was some timber. That he had been in School District 30 many a time, and that there is timber in it, flat, pretty wet, pondy country, some dry land, a great deal of it had been cut over. That there was timber along the San Jacinto River, but mighty little at places, the most of it had ben cut over, some lob-lolly pine in 15 or 20 years makes a pretty good tree. That witness had op-
erated a saw-mill in Montgomery County. That there is con-
424 siderable marketable tim-e- in District 28, but that pretty much all of the timber had been cut over in that section.

The witness, on cross-examination, testified that he had handled some real estate, attended to a lot of land. That there was right sharp farming out on the S. A. & A. P. Ry. That there was a prosperous farming community around Rose Hill, and that the farmers had prospered around Dairy and put the land up to $40.00 and $50.00 an acre, but that the witness did not think it was selling for that now. That a small portion of the South part of the county was stiff, black, hog-waller land. From Allen down to Deepwater there is a little of it over next to the bayou poor land, and when you get down next to the bayou it is chalky, alkali spots and would not

grow anything. That he did not see the farmers down there succeeding very well. That the land around Crosby was the best in the county, drained black land. That he had been running cattle nearly all his life, but had farmed. That he did not think it was a fact that cattle men generally got it in their heads that the land is not good for farming. That in Victoria County and San Patricio County they had ruined the land for cattle count-y, but that they did not have any farms out there. The stock men told him that the ranges were ruined by the ditches. That in this county, when they put in ditches, they injured the country. That the Germans around Rose Hill were not as prosperous as they were thirty years ago. That the Bohemians around Crosby were doing pretty well as a class, but then the big rice farm gave them work to do and wages. The sloughs were good for nothing, but that he knew of no place in South Texas, except Galveston County, where farming had been as slow in development as Harris County, but that this was so because it was so much better land, and because the land was not productive. That he had made about 20 crops of cotton, a man could cultivate about 15 acres on the black land, a little more on sandy, and that he averaged about 1/3 of a bale to the acre, costing about 75¢ or $1.00 to gather it on the share basis. That it took three teams to cultivate 60 acres.

425 Redirect examination by plaintiffs:

The witness stated that since 1901 he had been in the saw-mill business, except for a year or two, and the Manager of a mill, working for a while for the Kirby Lumber Company, and was Receiver of a saw mill and estimated a great deal of timber, buying and estimating.

(13) H. G. Lidstone, who had been recalled by the defendants, and on their examination testified as follows:

That he had experience in valuing franchises over the public streets, and had worked all the franchises in Houston, including the I. & G. N., which last he had valued three years ago. That there being no buildings attached to the franchise, the values would still be there and stationary. That he had made a thorough investigation, the value of the franchises being predicated upon the value of the abutting property. That he had determined how much of the streets were occupied by the I. & G. N. and considered the value of a portion of the streets occupied by the value of abutting property. That there were some controversies over the true value of the franchises, and that the I. & G. N. was picked up as a starter and that "we found $733,000 valuation" in round numbers in this way: A piece of ground that would have a $100.00 unit, 20 feet would — 25% of that unit and that would arrive at the gross amount of the franchises, and by general usage by permission of all the railroad people, that was cut in two and took 20%, and then 70% of the result was taken.

The relation was on the side and the abutting property. The Railroad would occupy a 10 foot width, which would take about

24/100 of that per cent, in other words, it was called 22%. The course of the track and its requirements was 8½ or 10 feet up and down the street, making allowance for swaying cars and the safety of people passing along and 10 feet was allowed as the part used by the railroad.

Cross-examination by plaintiffs:

This 10 feet taken out in the street was valued just as if the railroad owned it, and then because of the fact that the public had the right to use that street, it was cut in half and 20% of
426 that half taken and then 70% of this last result. The strip was treated like it had been fee simple to begin with and valued, then that value was divided by two and further as above. To illustrate: to get at the I. & G. N. "we took 20%; we took this $730,000 and cut it in two and took 20% of the half," that is 20% of $350,000 and then this 20% so arrived at was multiplied by 70. 20% of $350,000 would be $70,000.00 and 70 times $70,000.00 would be $490,000.00, but $490,000.00 was not assessed as the value of the I. & G. N. franchises in the City of Houston. They were taken first as gross $100,000.00 and they amounted so high that the City Assessing Authorities just agreed to let it go at $100,000.00. This course was generally pursued as to the Railroads, and all of them were put in on the same ratio and the same basis.

The theory testified to was worked upon the predicate that if a man had a section of land worth $100.00 an acre and a road ran through it occupying 13 acres, then the 13 acres would be assessed at the same ratio as the abutting property, but if the road way was used, the use of the public would operate a deduction on this assessment, and that the same principle would be applied in the case of the I. & G. N. Ry., pedestrians using the track almost as much as the Railroad, and under some franchises the Railroad being bound to supply drainage and pavement for the use of the public, as well as itself. All of these matters were taken into consideration and every Railroad in the City treated on the same basis. figuring on the unit basis and the value of abutting property. In the City this worked out that the assessed values run higher than the fee simple values, but in the county about 50%.

As far as the witness had worked out the block system in the City he stated that the assessed values were about half of the true values.

Redirect examination:

The theory as to the 10 feet occupied by the Railway was to cut "this $730,000.00 just half in two, representing the value of the railroad's franchise, allowing for the public use." The county has never assessed these franchises, it has always been a question why they should not be assessed.

427 (14) The defendants next introduced in evidence table showing the Tax Board's Intangible valuations of the different Railroads for the two years, 1914 and 1915, being No. 10 pp. 270 and 271 above.

(15) The defendants next introduced in evidence, over the objections and exceptions of the plaintiffs, table showing the intangible assets valuation of the I. & G. N. properties for the years 1906 to 1915, inclusive, and also the physical valuations for those years, and the true values for those years as found by the Intangible Assets Tax Board, and which is as follows:

"Intangible Assets of International & Great Northern Railway Company from 1906 to 1915.

True value.	Physical value.	Intangible value.
	1906.	
$31,428,586	$20,986,998	$10,441,588
	1907.	
.....	.....	15,921,425
	1908.	
35,663,779	21,208,359	14,455,420
	1909.	
35,795,416	21,306,816	14,488,600
	1910.	
36,076,982	21,588,382	14,488,600
	1911.	
36,076,982	21,588,382	14,488,600
	1912.	
36,076,982	21,588,382	14,488,600
	1913.	
42,364,303	27,875,703	14,488,600
	1914.	
43,264,303	28,775,703	14,488,600
	1915.	
39,116,033	28,373,810	10,743,223"

(16) Over the objections and exceptions of the plaintiffs the defendants introduced in evidence table of Texas Railroads 1914 and 1915 showing the true value thereof for those years as found by the State Tax Board, as follows:

428 (DEF'T-' EX. E.)

True Value of All Ry. Co's.

True Value.

Company.	1914.	1915.
Abilene & Southern Ry. Co.	$1,041,828	$1,087,066
Angelina & Neches River Ry. Co.	210,000	359,000
Artesian Belt R. R. Co.	480,000	427,000
Asherton & Gulf Ry. Co.	400,000	198,323
Bartlett Western Ry. Co.	145,000	224,621
Beaumont, South Lake & Western Ry. Co.	2,158,749	2,514,926
Brownwood, North & South Ry. Co.	300,000	147,700
Caro Northern Ry. Co.	100,000	180,000
Chicago, Rock Island & Gulf Ry. Co.	15,405,857	16,708,670
Crosbyton Southplains Ry. Co.	500,000	312,600
Denison & Pacific Suburban Ry. Co.	175,400	175,400
Eastern Texas Ry. Co.	427,000	595,940
El Paso & Northeastern Ry. Co.	1,251,600	540,830
El Paso Southern Ry Co.	37,800	41,000
El Paso Southwestern Ry. Co.	1,687,600	1,678,000
Ft. Worth & Denver City Ry Co.	21,236,920	21,009,850
Ft. Worth & Rio Grande Ry. Co.	4,031,155	4,158,752
Galveston, Harrisburg & San Antonio	55,564,000	55,064,200
Galveston, Houston & Henderson Ry. Co.	3,284,319	3,350,800
Groveton, Lufkin & Northern Ry. Co.	450,000	491,120
Gulf Colo. & Santa Fe Ry. Co. & Leased Lines	50,562,192	54,845,935
Gulf, Texas & Western Ry. Co.	2,200,000	1,304,554
Houston, East & West Texas Ry. Co.	4,844,795	6,295,580
Houston & Brazos Valley Ry. Co.	500,000	401,000
Houston & Texas Central Ry. Co.	31,362,992	35,538,000
International & Grt. Northern Ry. Co.	43,264,303	39,116,033
Jefferson & Northwestern Ry. Co.	200,000	167,960
Kansas City, Mexico & Orient Ry. Co.	6,839,000	5,981,200
Marshall & East Texas Ry. Co.	1,363,000	1,353,000
Missouri, Kansas & Texas Ry. Co. & Leased Lines	40,594,228	57,260,671
Missouri, Oklahoma & Gulf Ry. Co.	362,000	371,840
Miscow, Camden & San Augustine Ry. Co.	63,000	133,040
Nacogdoches & Southwestern Ry. Co.	225,000	173,546
Orange & Northwestern Ry. Co.	1,128,496	1,201,857
Paris & Grt. Northern Ry. Co.	997,200	1,321,000
Paris & Mt. Pleasant Ry. Co.	856,452	683,520
Panhandle & Santa Fe Ry. Co.	5,637,877	7,339,787
Pecos & Northern Texas Ry. Co.	13,074,477	14,598,642
Pecos River R. R. Co.	400,000	834,793
Pecos Valley Southern Ry Co.	493,385	493,385
Quanah, Acme & Pacific Ry. Co.	1,936,580	1,936,720

Company.	1914.	1915.
Rio Grande & Eagle Pass Ry. Co.	563,228	563,228
Rio Grande, El Paso & Santa Fe Ry. Co.	672,200	1,062,547
Rio Grande Ry. Co.	300,000	310,000
Roscoe, Snyder & Pacific Ry. Co.	723,173	723,173
San Antonio, Aransas Pass Ry. Co.	18,314,288	18,574,643
San Antonio, Uvalde & Gulf Ry. Co.	4,106,765	5,574,056
San Benito & Rio Grande Ry Co.	966,690	986,327
Shreveport, Houston & Gulf Ry. Co.	95,000	161,024
Southwestern Ry. Co.	372,096	389,905
Stephenville North & South Ry. Co.	2,607,000	2,667,500
St. Louis, Brownsville & Mexico Ry. Co.	11,926,783	11,964,720
St. Louis, San Francisco & Texas Ry. Co.	2,400,000	2,000,000
St. Louis, Southwestern Ry. Co.	15,333,116	14,232,540
Sugar Land Ry. Co.	615,884	596,674
Texarkana & Ft. Smith Ry. Co.	5,413,779	4,189,351
Texas, Arkansas & Louisiana Ry. Co.	22,500	101,960
Texas, Mexican Ry. Co.	1,691,000	1,707,638
Texas Midland R. R. Co.	2,115,828	2,296,128
Texas & New Orleans Ry. Co.	17,772,643	21,294,954
Texas, Pacific Ry. Co.	41,155,703	25,305,336
429		
Texas Short Line Ry Co.	235,100	214,319
Texas Southeastern Ry. Co.	600,000	536,393
Timpson & Henderson Ry. Co.	400,850	401,335
Trinity & Brazos Valley Ry. Co.	9,388,481	9,064,000
Trinity Valley Southern Ry Co.	40,000	40,000
Trinity Valley Northern Ry. Co.	120,000	117,263
Weatherford, Mineral Wells & N. W.	1,001,500	818,900
Wichita Valley Ry Co. and L. Lines	4,688,450	5,385,380
Brownsville Ferry Co.	30,000	30,000
Laredo Bridge Co.	80,000	80,000
Porfirio, Diaz & Eagle Pass	84,083	84,083

(17) The defendants next introduced in evidence table of the Railroad Commission of Texas showing the mileage of each of the Railroads in the State of Texas, and which is as follows, being a statement of the mileage, including main line, branches and spurs, but not including sidings and yard tracks.

"Mileage and other Statistics of Railroads in Texas.

Names of railroads.	Miles.
Aransas Harbor Terminal	10.00
Abilene & Southern	72.17
Abilene & Northern	38.70
Artesian Belt	42.23
Asherton & Gulf	32.10

Names of railroads.	Miles.
Angelina & Neches River	30.63
Bartlett Western	23.20
The Beaumont & Great Northern	48.30
Beaumont, Sour Lake & Western	84.29
Beaumont Wharf & Terminal	4.20
Burr's Ferry, Browndel & Chester	11.12
The Brownwood, North & South	17.65
Bryan & College Interurban	5.00
Cane Belt	107.92
Caro Northern	16.63
The Chicago, Rock Island & Gulf	468.89
Concho, San Saba & Llano Valley	59.56
Crosbyton-Southplains	38.82
The Dallas, Cleburne & Southwestern	9.82
The Denison, Bonham & New Orleans	24.15
The Denison & Pacific Suburban	7.63
Dallas Terminal & Union Depot	5.82
Eastern Texas	30.30
El Paso & Northeastern	19.22
El Paso & Southwestern of Texas	4.69
Fort Worth Belt	18.10
Fort Worth & Denver City	454.14
Fort Worth & Denver Terminal	13.86
Fort Worth & Rio Grande	223.44
The Galveston, Harrisburg & San Antonio	1,331.70
Galveston, Houston & Henderson	47.33
Galveston Terminal	3.49
Galveston & Western	4.50
430 Galveston Wharf	45.54
Groveton, Lufkin & Northern	21.15
Greenville Northwestern	11.48
Gulf, Beaumont & Great Northern	77.78
Gulf, Beaumont & Kansas City	62.62
Gulf, Colorado & Santa Fe	1,145.14
The Gulf & Interstate of Texas	70.24
Gulf, Texas & Western	99.10
Hearne & Brazos Valley	18.59
Houston & Brazos Valley	27.70
Houston Belt & Terminal	18.59
The Houston East & West Texas	190.94
Houston & Texas Central	828.28
International & Great Northern	1,106.00
Jasper & Eastern	17.46
Jefferson & Northwestern	35.86
Kansas City, Mexico & Orient of Texas	464.69
Marshall & East Texas	91.32
The Missouri, Kansas & Texas of Texas	1,119.33
Moscow, Camden & San Augustine	7.00
Missouri, Oklahoma & Gulf of Texas	9.10
The Nacogdoches & Southeastern	14.00
The Orange & Northwestern	61.55

Names of railroads.	Miles.
Panhandle & Santa Fe	124.92
Paris & Great Northern	16.94
Paris & Mt. Pleasant	51.32
The Pecos & Northern Texas	569.79
The Pecos River	54.24
The Pecos Valley Southern	40.40
Port Bolivar Iron Ore	29.66
Quanah, Acme & Pacific	78.92
Rio Grande	22.50
Rio Grande & Eagle Pass	28.11
Rio Grande El Paso & Santa Fe	20.22
Riviera Beach & Western	9.70
The Roscoe, Snyder & Pacific	49.77
The St. Louis, Brownsville & Mexico	471.80
St. Louis, San Francisco & Texas	85.32
St. Louis Southwestern of Texas	694.95
San Antonio & Aransas Pass	723.80
The San Antonio, Fredericksburg & Northern	23.47
San Antonio, Uvalde & Gulf	313.66
San Benito & Rio Grande Valley	64.99
Shreveport, Houston & Gulf	9.00
Southwestern	29.09
Stamford & Northwestern	82.50
Stephenville, North & South Texas	105.73
Sugar Land	32.72
Texarkana & Fort Smith	87.33
Texas, Arkansas & Louisiana	7.70
The Texas & Gulf	94.55
Texas & New Orleans	452.12
The Texas & Pacific	1,038.16
Texas Central	308.72
Texas City Terminal Co.	6.40
The Texas Mexican	161.85
Texas Midland	111.18
Texas Short Line	11.70
Texas Southeastern	27.85
Texas State	32.56
The Timpson & Henderson	34.00
The Trinity & Brazos Valley	302.82
Trinity Valley & Northern	18.00
Trinity Valley Southern	6.00
The Weatherford, Mineral Wells & Northwestern	43.64
The Wichita Falls	17.98
431 The Wichita Falls & Northwestern of Texas	17.10
Wichita Falls & Oklahoma	22.80
The Wichita Falls & Southern	52.36
Wichita Falls & Wellington of Texas	15.00
The Wichita Valley Ry.	52.20
Wichita Valley R. R.	60.70
	15,569.30"

(18) W. L. Holder was recalled by the defendants and further examined by them and testified on their examination as follows:

Having reference to statement made to the State Tax Board for the year 1915 he said that the rendition of the physicals of the Railroad, exclusive of the rolling stock in the different counties, amounted to $13,002,980.00. When this testimony was offered the plaintiffs objected, and it was introduced over their exceptions, and over these exceptions and objections the following table was introduced into evidence:

Amt. of I. & G. N. Ry. Co.'s Rendition to the Various Co.'s for Year 1915, Exclusive of Rolling Stock.

Anderson	967,000.00
Atascosa	17,275.00
Bexar	786,000.00
Brazos	537,600.00
Brazoria	199,350.00
Cherokee	347,760.00
Comal	311,000.00
Ellis	254,430.00
Falls	359,810.00
Fort Bend	60,420.00
Freestone	29,370.00
Frio	328,130.00
Gregg	166,560.00
Grimes	546,690.00
Hays	340,340.00
Hill	262,680.00
Harris	964,275.00
Houston	363,100.00
Leon	495,440.00
La Salle	332,325.00
Madison	63,650.00
Montgomery	468,825.00
Medina	123,660.00
McLennan	450,960.00
Milam	373,900.00
Navarro	200.00
Williamson	438,540.00
Wood	58,560.00
Walker	451,035.00
Waller	16,910.00
Webb	309,785.00
Robertson	759,000.00
Rusk	219,080.00
Smith	711,180.00
Trinity	158,600.00
Tarrant	163,020.00
Travis	437,280.00
Johnson	129,240.00
Total	$13,002,980.00

432 Referring to memoranda which he had, the witness stated that it appeared that on November 25th, 1870 for $1.00 consideration, a certain 60 foot right of way had been donated which did not appear how long, and a 100 foot right of way in the Judson tract had been donated Nov. 29th, 1870. It was then stated to the witness to pass all of those donations or conveyances in Harris County of rights of way or real estate which showed a conveyance on the consideration of $1.00, and to take the others. The witness answered that most of them showed such dollar consideration or gift consideration.

The plaintiffs objected to this course of interrogation, and to this testimony, and over their objections and exceptions it was introduced as follows:

And the witness testified from his memoranda that there had been conveyed to the Railroad May 1st, 1871, 11.2 a. on the Walton Survey; April 27th, 1870, 14.9 a. on the Upshaw Survey; April 30, 1870 5 a. on the Sevey Survey; on the Washington County Railroad Survey 9.7 a.; on I. & G. N. Railroad Survey 12½ a.; on H. T. and B. Survey 10.1 acres; all of January 28th, 1877. On the H. T. & B. Survey 12½ acres conveyed Nov. 8th, 1880. On the Borrow Survey 2.4 acres Nov. 8th, 1880; on the Borrow Survey 7.8 acres Sept. 26, 1870; on the Smith Headright 13.9 acres Nov. 8, 1880; on the Holland Headright 13.1 acres Nov. 8, 1880, which wound up the main line in Harris County. The witness stated that he had memoranda of acquisition of title of land on the other Divisions in Harris County as follows: On the Ft. Worth Division July 21st, 1902, 8,712 square feet conveyed by Sellers; by Mrs. Annott 1.14 acres, no date. By Wm. M. Rice Estate 8,276 sq. feet, no date; by John Hirsch 2.14 acres July 17, 1902; By Milo Heirs 4.12 acres by suit not consummated; by Mrs. Weirech 4.65 acres May 2, 1903; by suit against C. F. Wendorf 13.47 acres July 22. 1902, and by C. F. Wendorf 3.60 acres July 22nd, 1902.

Coming to the Magnolia Park Division, the witness said that he did not know that the purchase of the Magnolia Park line included all the acreage of the Houston Belt & Terminal Division, but
433 that he had the deeds in three big bundles; that the consideration for the purchase of the Division he thought was $600,000.00; that he was not familiar with the property on the Division, except that he had been over it once only and glanced at it, but could not say whether or not values had enormously increased on it since 1903, but would think that those around the Turning Basin had been increased. That he had heard most of Mr. Heiser's testimony as to values down there, but was not familiar enough with the values to give an opinion, but thought that since 1904 property all around had increased in value, that it was his understanding that Magnolia and Central Park and developments in that vicinity had been opened up since the I. & G. N. had acquired the Magnolia Park Division, but that he had been in Houston as Land & Tax Commissioner only about a year, but had gone through all of the Divisions on the subject of the donated land, ex-

cept the Magnolia Park Line, which was done at his office, but that he did not think that there were many donations on that Division.

The witness stated that on the John R. Harris Survey the I. & G. N. Ry. owned 94.6 acres, and 15.6 acres on the S. M. Williams Survey, which included everything East of Harriet Street, the 15.6 acres being the right of way shown in the yellow lines from Harriet Street at the top of the map herewith in the Exhibits of Maps, part of this statement, that is, as shown on map marked "Exhibit 16." This 15.6 acres being in yellow is the right of way extending Westward from the 94.6 acres, which 94.6 acres is shown on the same map marked "Exhibit H" fronting on the Houston Ship Channel. The witness further testified "The width of this right of way is 80 feet from where it leaves the 94 acre tract to a point within about ½ block of the Houston Belt & Terminal Railroad, and from that point back to Harriet Street it is 60 feet wide. From Harriet St. on into the city the I. & G. N. Railway does not own the right of way, but has a franchise over the streets. The right of way to the Otis Elevator Company begins on Commerce St. between Palmer and S. A. & A. P. Ry. property as shown on "Exhibit 19" of the Exhibits of Maps made a part hereof. The width of this right
434 of way is 25 feet and extends to German Street and contains an acreage of 15/100, being a right of way for a spur track to serve the Otis Elevator Company. On the same map appears the plot of the right of way to serve the Houston Packing Company, beginning about half way between German and Commerce Streets between the line of the S. A. & A. P. and the Houston Packing Co. property extending first to German Street and begins again on the North line of German Street and extends to the South line of Engelke Street and extends to Station 24 plus 27 as shown on the map in all 2,497 feet, or 49,940 sq. feet, 1 1/10 acres.

The defendants next examined the witness Holder upon map marked "Exhibit 18", being of the railroad properties from a point between Sheppard Street and Buffalo St. to Main Street South of the bayou. The witness stated that Commerce Avenue connects the yards with the freight depot and is part of the highway occupied by the Railway under its franchise, and that the Railway did not own any land between the yards and the freight terminals of the freight depot up towards Main Street, but that the Railway did own land East of the G. H. & H. Railroad crossing, which was included in the 9 mile rendition, but that on this map No. 18 there was no land owned by the Railroad except up at the freight terminals where the Road owned all of blocks 11, 12 and 6. These blocks are not handled as acres, but as lots and blocks, and also owned a small corner 25 by 50 of block 8 and 102 by 250 feet in block 7, and also 500 sq. feet in block 10. This includes all the lands on this map which are rendered as part of the Houston Belt & Terminal Division of the I. & G. N. Ry. On the Main Line Division there is also shown property owned by the Railway, as appears on this map 18, to-wit: Block 55, 21.74 acres in that block; block 53, 13 acres; block 48, 9.4 acres; block 45, 1.4 acres; 49/100 of an acre in block 49; block 34, part of tract 527 as shown on the map, and tract 538 is the same as 531.

Some of these properties belonging to the Main Line Division are not shown on this map marked "Exhibit 18".

435 At this point this testimony and other testimony of the same course was objected to by the plaintiffs, and the objections being overruled, over their exceptions it was put in. The witness said that the I. & G. N. properties were shown within the yellow lines on the map. That he had not examined to determine whether it was all held fee simple, as a rule it was fee simple.

The witness was next examined upon a map referred to as Map No. 4, being "Exhibit 20" of Exhibit of Maps herewith, and he stated that the trackage of the I. & G. N. Railway in a general way was shown on this map in yellow lines there enclosed, and that in block 45 there were 1.4 acres. That the long strip of right of way through blocks 14 and 13 in the Schrimp estate between German Street and Buffalo Bayou contained 1.3 acres, and that the acreage between 1 and 9 was 1.37 acres, and that there was additional acreage of 1.37 acres, and also a side track from Lockwood Meyers to block 1 in Factory Addition, and a right of way from the M. and P. Oil Mill track through the D. Gregg Survey, all shown on the yellow lines on the map, and usually outside of the portions in or across streets owned by the Railroad in fee simple. The witness said that he could not say in each specific case. They were for rights of way to reach industries, but the witness modified his statements that they were fee simple and stated that he had not read them, but that these right of way contracts usually contained a provision that the land reverts back to the owner if the land is for industry, if the track is taken up. In other words, he stated that usually these industry spurs were on eastments. At this point the court ruled that this property should not be stated in the record as owned by the Railroad, that the locations of the properties might be shown and afterwards the defendants could show if it were a fact that the property was owned by the Railway Company.

The defendants then took under consideration the map referred to by them as map 5, which the witness Holder stated would represent the next section. This is "Exhibit 21" of Exhibits of Maps herewith.

436 The witness stated that the I. & G. N. had thereon 2.4 acres South of blocks 9 and 10 North of Wright's and west of Benson, and also a triangle of the Ehringer block South of Nance Street, and ½ acre, and also Abstract 329, 19 9/10 acres; lots 1, 4, 5, 8 and 9 in block 5. Block 9, lots 1, 4, 5, 8 and 9; block 10, lots 1, 2, 3, 4 and 5. The witness stated "you see we are rendering the street." Also block, lots 1, 2, 3, 4 and 5; block 6, lots 1, 2, 3, 4 and 5; block 3, lots 1, 2, 3, 4 and 5; block 8, lots 1, 4, 5, 8 and 9; block 4, lots 1, 4, 5, 8 and 9; block 1, lots 4, 5 and 6; block 6, lots 1, 2, 3, 4, 5 and 6 and 15 feet right of way spur to South Texas Iron Works in Block 3. The witness said he did not know whether the Railroad owned these properties in fee simple or not, but in addition that there was some acreage down in 14 and 13, a tract west of Bremond St. and N. E. of Buffalo Bayou and down to the Bayou City Compress. The witness said that it was his understanding that the Railway held title

of some sort to the property shown within the other boundaries, but that he did not know whether it was fee simple or leasehold, or easements, but that it was either fee simple or easements.

The witness was next examined by the defendants on what was termed by them map No. 6, being "Exhibit 23" in the Exhibits of Maps herewith, and stated that the yellow lines included the acreage claimed by the railway, and that it covered right of way from Magnolia Cotton Oil & Petroleum Oil Mill, tract D. Gregg Survey, 3½ acres. The yellow lines are supposed to cover all of the I. & G. N. property and reaches out to near the city limits.

At this point the defendants asked the witness whether he kept contracts for rights of ways and deeds. He said that he kept the deeds, but the Auditor had most of the contracts, such as industry contracts and trackage contracts. The witness stated that it would be a great job to get all of those deeds and all of his files. At this point the plaintiffs stated that they offered the deeds covering the I. & G. N. property located on the maps undertaking to make a satisfactory abstract of the same, the deeds not being in court, and to complete their offer by making an abstract of the deeds.

437 (19) The defendants next introduced in evidence a petition of the Receivers of the I. & G. N. Ry. in the existing Receivership running in the U. S. District Court for the Southern District of Texas, entitled the Central Trust Company of New York, Complainant, vs. I. & G. N. Ry. Co., Defendant. This petition is dated August, 1914, and was an application to the Judge to permit the Receivers to carry forward, and purchase by way of conditional sale of certain equipment as shown by the contract of the I. & G. N. Ry. Co. made the 1st of August, 1913, with Blair & Company, in which transaction the Equitable Trust Company of New York was Trustee,

200 steel underframe box cars ventilated,
200 steel underframe box cars,
400 steel underframe stock cars,
200 all steel Gondola cars,
13 oil burning consolidation freight locomotives and accompanying tenders

were involved, of which it was stated the Railway Company had paid and agreed to pay $1,245,580.00, of which amount $245,580.00 was paid in cash at the time of the contract, and the balance was to be paid in 20 consecutive semi-annual installments of $50,000 each, payable respectively on the 1st of February and the 1st of August of each year, commencing Feby. 1st, 1914, and ending August 1st, 1923, evidenced by 50 notes of the Railway of $1,000.00 each, with interest at 5%.

The Receivers represented to the court that the title to this equipment did not pass into the Railway, but that provision had been made that in case of default, the Vendors could repossess themselves of the equipment and that there was due on August 1st, 1914, principal notes in the amount of $50,000 and interest. Authority was

sought from the court for permission to pay these equipment notes, which the court granted on the 28th of August, 1914.

(20) Defendants next introduced in evidence petition of the Receivers in the same case of Sept., 1914, wherein the Receivers called to the attention of the court that Thos. J. Freeman, as Receiver in the previous Receivership of the sold-out I. & G. N. Railroad, had, on October 1st, 1908, purchased from Iselin & Company by con-
438 ditional sale in a transaction in which the Guaranty Trust Company of New York was Trustee, the following equipment, viz:

10 ten wheel locomotive engines with tenders
500 36 foot wood underframe boxcars

and that he had agreed to pay therefor $420,000.00 of which $40,000 was paid in cash and the balance to be paid in 20 notes semi-annually of $19,000 per each installment, but that each of the installments was evidenced by 19 notes of the amount of $1,000.00 each, bearing interest at the rate of 6%. It was further set out that the title had been reserved, and that if the payments were not kept up the Vendors could repossess themselves of the property, and that a portion of the notes had not been paid, and authority was sought to complete the payment, which was granted by the Court.

The plaintiffs objected to the introduction of these documents, but over their objections and exceptions they were introduced.

(21) A. B. Kelly was called by the defendants and on their examination testified as follows: That his business is real estate and has been since 1885 and since in 1901 that he has been engaged in that business in Houston where he thinks he is familiar with land values.

There was next exhibited to the witness map referred to as Map No. 1. This map is marked "Exhibit 16" in the roll of maps herewith, a part hereof. It shows the location of the I. & G. N. Railway's right of way from Harriet Street in an easterly direction down through Oak Lawn, Fuller & Latham's Addition, Central Park and down to the Ship Channel, just below the Turning Basin. The witness said that he was familiar to a great extent and more or less to the land values in the vicinities shown on that map, and that starting at Harriet Street and going through the Brady Addition which is further from the street car than it is in Oak Lawn and in Fuller & Latham, he thought the property was worth about $600 to $650 a lot on a fair average; that is, from Harriet Street to the Houston Belt and Terminal Railroad, and marked on Map. (See Map Exhibit 16 between the points "*a*" and "*b*.") The witness was next asked to begin at the point "*b*" where the Houston Belt & Terminal
439 R. R. crosses the I. & G. N. track and to continue to the point "*c*," marked on the map at the curve of the track, and to say what property lying adjacent to the I. & G. N. through that strip of territory was worth, and he answered that to figure on these lots 25 by 125 feet, he believed that about $225 or $250 each would be the selling value thereof; that the lots between points "*a*" and "*b*" were 50 by 100 feet.

The witness was next asked as to the value of the property lying adjacent to the I. & G. N. right of way from the point "*c*" on the map to the point "*e*" and then from point "*f*" to point "*g*" and stated that there was a whole lot of low land that was being filled; that as to the valuation of the lots lying adjacent to the right of way next up to it, not three or four blocks away, there was a lot of it not as desirable; that from point "*c*" to "*f*" it was not quite so desirable as from point "*c*" to "*b*;" that taking from point "*c*" to "*f*" around the entire circle and adjacent to the right of way where they are filling that $200 per lot would be a liberal valuation for it, and passing a little point past "*f*" and that he applied his testimony for 1915, there not being much difference between that time and the present; a little better now, if anything; but that when one got between points "*f*" and "*e*" closer to the Bayou and Turning Basin, property would be more valuable for warehouses and wholesale purposes, and worth from $200 to $225 per lot, that is, 25 foot lots; that figuring from point "*f*" to point "*g*," including those from "*c*" to the line "*f*" and "*g*" the property lay more than one block from the Harrisburg Road; that the streets are not all open, but that there is a railroad and other fences, but that he would value it on an average at $225 per lot from "*f*" to "*g*" and from "*c*" to "*g*." As to the frontage enclosed within yellow lines lying along to Houston Ship Channel and the property of the I. & G. N. the witness considered that it would sell readily enough for $3,000 00/100 per acre.

440 The witness was next examined in connection with map referred to as Map No. 2. This map is marked No. 19 in the roll of exhibits of maps, a part hereof. The witness was examined upon the property enclosed by yellow lines stated by examiner to represent the I. & G. N. property, and he was asked to give his best judgment of the reasonable market value of the land adjacent to the I. & G. N. Railway. The witness stated that beginning on Engelke Street at point "*a*" on the map that the lots facing the street car had pretty nice little improvements and that he could hardly figure that as a fair criterion on it, but that he thought $15 per acre would be a fair value on the land from point "*a*" to point "*b*," point "*b*" being at the end of the yellow strip towards Buffalo Bayou. The witness was next asked in regard to the land along the yellow strip lying between points "*c*" and "*d*," that is, from Engelke Street to German Street, and answered that there was nothing in the way of improvements, but that he thought that the land at point "*d*" was more valuable than at point "*c*;" that there are some temporary cotton sheds and that it would not sell for over $500 or $600 a lot or $1,500, and that a man who paid $1,500 an acre would not make anything out of it, and that that was a conservative figure, though some people would say that the witness was too low.

As to the strip designated between points "*e*" and "*f*" leaving German Street and coming on towards Commerce Street, the witness said that along Commerce Street property had been valued at $1,500 per lot, but that when you got away from Commerce Street that must be more than cut into, say $600 to $700 a lot of 50 by 100 feet. As to the strip from "*g*" to "*h*," witness said that his remarks as to strip

"*e*" and "*f*" would apply; that it was worth about $600 per lot. As to values between points "*i*" and "*h*" and "*i*" and "*j*," point "*i*" being on Commerce Street or avenue, the witness said that they involved front on Commerce Street and that the property was held from $1,250 to $1,500 per lot, and that he put these lots on Commerce Street at that value.

441 Witness was next examined in connection with map No. 3 which is exhibit 18 in the roll of map exhibits herewith, a part hereof, and testified in connection therewith, as follows:

The witness was first asked in regard to tract around which there is a yellow mark and which is marked "*a*," lying Northwest of Commerce Street close to the crossing of the two I. & G. N. tracks with each other, and he stated that he would value that at $20,000 per lot of 50 by 100 feet, which would be a little conservative, and that it was well worth that. Coming to the little corner of Block 8 on Commerce Street, being a triangle marked in yellow and marked "*b*" on Map, the witness said that a lot in Block 10 at the corner thereof was worth $20,000 a lot, but that this small piece would not be worth as much in proportion; that Block 8 was North of the track and that figuring it as worth $15,000 a lot, one would be getting a good strong valuation. As to that portion on Block 7 designated within yellow lines and marked "*c*," the witness said he considered that worth $15,000 per lot. Now as to Block 6 marked "*d*" on map and enclosed in yellow line, witness said the Bayou lent an addition to the whole block, and he thought that it could be sold for $20,000 a lot, and that land was for sale at $30,000 per lot in Block 5 on San Jacinto Street. Witness was next asked as to lot enclosed in yellow in Block 10, being lot 10 marked "*e*" at the corner of Austin and Commerce, the witness said he thought that it could be sold for $17,500, at a safe figure. The witness was next asked as to Blocks 12 and 11 marked "*f*" on the map, and on which the freight depot buildings are with improvements on them, and witness said he thought that the blocks would sell at $20,000 a lot, that it would bring that without the improvements.

Witness was next questioned as to map designated as 3-*a*, being Exhibit 17 in the roll of maps herewith and a part hereof. The witness was first asked as to the triangular piece on which numerous tracks and the roundhouse are situated, marked thereon

442 "A," "B," "C," "D" and stated that he knew where the property was located and that it was worth on an average of $6,000 a lot, that is, the lots on Blocks 191, 209, 215, 230, 214 and 210 in that vicinity, but that on a sale one could realize about $2,000 a lot, but not right now, and that conditions were not greatly different, but not as good in 1915, and that the witness considered it really worth $2,000 per lot, but thought it would not bring that in cash now; that from "A" to "B" the witness considered it good for $2,000 a lot, but along the entire length about $1,250 a lot; that on another side it is not worth as much; from "B" to "C" say $1,250 a lot, and the other two sides from $2,733 to $3,333 per lot as a pretty close estimate. The witness was next asked as to the triangle "C," "E," "F" and "D" which lies along the Harrisburg road and includes the switch

yard and cotton platform, as shown on the map, and said that from "C" to "E" it would be worth from $2,000 to $2,500 per lot; dropping off there a block you cut that into, and going along the line "E" and "F" you cut that into, and back a little ways it would be down to $1,000 per lot; from "G" to "F" it would be worth $1,000 per lot and from "F" to "D" there being trackage facilities one would put it at about $1,500 per lot, but when you get away from the track it is not worth that much: that that would give one side $2,500, the other approximately $1,000 and the other approximately $1,500; that $1,500 is all that it is worth, though some would bring more money, though an average of $1,500 for the three sides; that there is very little one could figure on at $2,000 per lot for the whole triangle.

At this point the plaintiffs excepted to this testimony and moved to strike it out, all of which was overruled and over the exceptions the witness continued to testify.

In connection with this objection the witness was asked whether or not a large portion of the values to which he was testifying were based by him upon the existence of the railroad, and whether or not if the railroad was not there his testimoney would be on a dif-
443 ferent basis, and the witness said that that was true and that his testimony was based in large part upon the existence of the railroad.

Continuing his testimony on the examination of the defendants the witness was asked as to Block 527 marked on Map "J"; he said that with the railroad there and several houses on the block Blocks 528 and 529 could be bought at $900 a lot and right across the street at $1,000 a lot, and that $1,000 as his estimate applied to 527 and 528, and that his values were pretty nearly what he could get for it.

Witness was next examined on map referred to as Map 4. This is Exhibit "20" in the roll of Maps, a part hereof. The witness was requested to start with Blocks 35, 45, 34 and 33, the portion enclosed between the yellow lines "A," "B," "C" and "D," and stated that he valued it at $2,000 a lot, and that leaving that and going into tract "E," "F," "G" "H" he would put that at $1,500 and $1,000 a lot, and that in "G," "I," "J" "F" at $1,000 and the rest down here at about $5,000 per acre, that is, the rest on Map 4.

The defendants next stated that they would take up Map 5. This map is Exhibit 21 in the roll of maps, a part hereof. This map shows property immediately North of the Bayou, and the witness was asked as to tract marked thereon at its corners "A," "B," "C," "D" and "E," enclosed in yellow lines, containing 19.9 acres, and he said that that was trackage land, and that along "A" to "E" on the Bayou front he thought it would be worth $5,000 an acre, but was afraid that he was a little high on it. He was next asked as to tracts marked "R," "Q," "O" and "P," that is, marked with these letters, not so marked at the corners, and enclosed within yellow lines, and he answered "including this up to this point would be $5,000 and including "R," "Q," "P" and "O" $5,000 per acre, and that if it were not for the railroad it would not be worth that much," but that he was not taking into consideration the rails and ties, but just

what the land he thought would bring, and that as to the land along the car line accessible to both the railroad and car line it
444 was thought about $2,500 per lot, including about half of "O" and the other half of "O" at about $1,500 per lot. In these estimates were included the piece marked "O-2." As to the piece marked "M" and "N" in yellow, witness said that he thought they were worth abo $2,500 per lot on account of car lines, paved streets and railroad, and half of it about $1,500 per lot, and as to pieces marked "K," "L," "J," "I," "H" and "G" he valued at about $1,500 per lot and "F" at about $2,000 per lot, and "X" Block 6 to the North with railroad tracks at $1,500 per lot; and that in Block 3 at about the same, and Block 14 down along the Bayou and on the switch tracks say $1,250 per lot, and Block 13 on the same switch track at the same, and so in the next block.

The witness was next examined upon map referred to as Map 6. This is Exhibit 23 in the roll of exhibits, a part hereof. The witness was first asked as to the strip beginning on the South end of the map, point "A" and running North to points "C" and "D" and said that he considered it worth $600 per acre, and the little triangle opposite point "D" marked "X" was not included by him, but that from "C" "D" to "E" "F" he would value it at $500 per acre, and that it falls down mighty fast from that point on to the North line of the S. M. Harris, he would value it at $200 per acre and from "E" "F" to "G" "H" it was hard to say what it was worth, about $200 per acre. As to switch strip shown in yellow marked "IJ" "KL" he would make the same estimate.

The witness was next examined by the defendants on map referred to as 6-1, being Exhibit 21 in the roll of maps part hereof, and said that from "B" and "C" he valued the property at $500, from "E" and "F" at the same price, and from there on down to "A" at $650 per lot.

445 Cross-examination by plaintiffs of the witness Kelly:

The witness said that if he had a factory which he could not sell and had to use it for factory purposes alone, and if the law did not permit it, say, and that the enterprise only paid an income on a fair lower valuation than the value of abutting properties, then he would not put the value on that property which he did on adjacent property.

This statement having been made the defendants objected thereto that the law did not require the railroad to be permanently located; that it could be taken up. Whereupon the court said that the question had no foundation in the evidence that there was nothing in the evidence about factories.

The witness further tesified over objection and the exception that he could not tell what the I. & G. N. properties are worth for railroad purposes; that he did not know where to commence to figure; that he would have to know something about the income and the expenses, and that taking these properties as tied up under the necessities of the situation and the law and the switch yards, depot stations &c., he could not tell what they were worth for railroad pur-

poses; that that would depend on what the returns on the capital were yielding, and that he thought that the railroad had a great deal to do with making the values along its line, to which he had testified.

(22) The defendants next introduced in evidence maps of which true copies appear in the Exhibits of Maps made part hereof, being Exhibits 2 to 23 inclusive therein, and which exhibits are part of this statement.

(23) A. E. Ammerman was called by the defendants and testified: That he was formerly County Judge of Harris County, serving from November 1906 to November 1912 as County Judge and a member of the Board of Equalization; that the full rendition was passed in 1908 and affected the assessment of that year; that the Commissioners Court instructed in 1908 to get a full rendition, and that neither he nor the Commissioners Court at any time
446 subsequent to the date when he so instructed the assessor instructed him to get anything less than the full rendition on property in Harris County, and that if any such instructions had come from the court he would have known it; that because of the passage of the full rendition law and the increased amount that was turned in by the assessor, the rate was cut from 52 cts. to 38 cents; that he recalled that all representatives of the railroads, that is, the Land and Tax men of all the railroads, appeared before the Commissioners Court or the assessor or himself as County Judge and argued that railroad assessments should not be placed at the full rendition. The gist of it was that if the intangibles came to the counties at an arbitrary figure and could not be regulated by the Commissioners court, then that according to the contention of the railroads real estate assessments of the railroad should not be taken at the full value, because the intangibles were taken at the full value and that the railroad property, that is, real estate and rolling stock, were taken at the same rendition as other property in the county, then, that adding all these together, they would be unfairly treated, and that the Commissioners Court took into consideration the fact that the intangibles were at 100% on the dollar, and that they could not alter those figures on the intangibles, and that his recollection is that real estate of railroads is slightly less than real estate of the same character, and that his recollection was that the Board did not raise the railroad real estate as they did the real estate owned by other people. That it takes an expert in that particular line to value the property of railroads and to classify properly the tangibles and intangibles, and that the Board had numerous conferences with Mr. Miller, the Assessor, and the Land & Tax Agents of the railroads in arriving at that basis and relied very largely on what the railroads said as to the value of their physical properties and as to the classification, and that the Land and Tax men had always treated the Commissioners Court very fairly and got on reasonably together.

447 Cross-examination by the plaintiffs:

The witness testified that he did not consider that the values of Harris County, railroad and otherwise, were at their true value; that it was the first year that the Board had undertaken to get the true value and that there were many thousands of assessments, and that he thought that property was slightly under the true value, and that therefore he wanted to put the railroads on a parity and for that reason reduced the railroad assessments below what they were.

The witness said that he was not a real estate expert but fairly posted on values in the County; that he was unable to say whether or not the railroad assessments are practically the same as they were last year, or whether or not they are far less than half their true value, but that he did not think the railroad right of way is assessed anywhere near its true value based on claims for damages which the roads put in when the right of way was taken.

That he lived here a long time; was born here in Houston and knew the South Texas Commercial National Bank and the First National Bank, and that he knew that in 1912 their stock was above par, but did not know whether or not it was above the book value, as he is not an expert on bank stock, but knew what made the book value, though not the details; that the book value of bank stock is the value of the capital stock according to bank books, no reserves and undivided profits added together; in other words, the capital on hand; that this bank stock had been assessed at 70 per cent of its book value on a system, and that when the Commissioners court did that as to the First National Bank, they knew that its stock was not at a discount at 30% below its value, and did not intend to treat that bank more favorable than other taxpayers, but intended to treat all taxpayers alike. The witness was asked that assuming that the assessments for 1915 of these two banks worked out that they paid taxes on 50% of the market value of the stock, then that the board took 30% below what they knew it was worth. The witness
448 was asked whether or not this was true. He answered that assuming that the questioner was directing his statement, then that it was true. He was then asked whether or not the same concession was extended to every other taxpayer in the county, and whether or not he would not favor these bank people at the cost of other people, and he answered: "No sir." That it was the effort of the Board to pursue the system throughout, treating everybody alike. The witness said that he had property in the county, but did not know at what any of his neighbors assessed their property; that the assessor assessed his property within $700 of what it cost him; that being County Judge he took whatever the assessor handed him; would have paid double if the assessor had put it that way; would not contest it, as he felt himself in a delicate position; that he took it at whatever it was put on the rolls; that he owned a homestead and when he said that it was assessed within $700 of what it cost him, he had reference to his present home, not the homestead he referred to; but that he did not remember the assessments; that he knew that there were generally speaking in force as to the rural

school districts the principle that lands should be assessed on a scheme as to each school district, not including those right around the city; that he knew that each school district was taken and an average value arrived at per acre; that ordinarily each school district was taken and assessed at the minimum or maximum, whatever it was; that he thought a minimum valuation was arrived at and then if any land was especially valuable that was added too, but that its addition would be exceptional, but that he thought a uniform assessment went through each school district; that he knew Mr. Heiser and Mr. Blake, the latter being still in office, and both being in the assessor's office during his whole administration; and that they both had intimate knowledge of this situation, especially Mr. Heiser, who was the Chief Clerk and was presumed to know more about it, though Mr. Blake probably had the information; that the Commissioners Court took the assessment rolls and that if they did not think they were right, told the assessor so, and went through all the assessments before they passed on them; that this was done while the
449 assessments were being made, the court always keeping ahead of the book they were assessing on and some of the assessments were very much wrong, but that the assessments in the rural parts were done by school districts.

That he did not recall the standard for bank stock as there were several elements going into the making up of that standard; that he remembered that there was some discussion about it, and that it was figured on taking into consideration the probable loss for the year, but that this matter was taken up in more detail with the assessor than with the Board, and that he thought Mr. Miller, the assessor, handled that matter, at least he always handled it with the witness; that the Board did not mean to say that bank stock selling on the market for a big premium was worth less than it was selling for, but that it meant to say, taking into consideration all the bank stock and the other property of the bank, that a uniform assessment of that bank stock and undivided property, taking into consideration the losses, would be something less than 100 cents on the dollar, although the bank stock might be selling at a great deal more than 100 cents on the dollar; that he knew that there was an established market value, but only knew in a general way what that was; that the Board was not equalizing the real estate holdings of these banks in making these assessments of bank stock, that is, equalizing these real estate earnings with those of other taxpayers, but that he thought the real estate assessments of banks would be found to be on a par with all other assessments, and that these real estate holdings were equalized with real estate of a similar nature, but that this was not done by taking real estate at something below its market value; that in making real estate assessments the Board took into consideration what the fair selling price of it was, not upon an installment or deferred payment basis and did not intend to assess real estate below this standard—"that is probably the result." "The probable result was that the Board did."

This testimony was put in over the objection and exception
450 of the defendants.

That the witness had 2½ lots in Kenilworth in 1912, costing hi-, $3,500 one fifth cash, balance in five years, not all paid yet, and that he had these lots in 1911; he considered them of the fair value in 1911 of about $3,000; the assessment was shown the witness and he stated that they were assessed in 1911 at $1,875; that he signed whatever the assessor had put down, and that in 1910 the assessment was the same, and that then the property was worth about $3,000; that he bought it for $3,500 in 1908 or 1909; that it has not gone up yet; and that a quarter of a block in the immediate vicinity had sold for the same price that it was sold for in 1907; that he did not think it had gone up any in 1910; the witness said that he had Lot 10 in Fair Grounds Addition on Elgin Street which was his home, costing him about $4,600 and rendered for $3,000; that he put his improvements on his homestead in the Fair Grounds Addition in 1909 or 1910 or possibly 1911; that they were completed in the Fall of some year; that he did not ask any questions to see whether or not his assessments were put as near as possible on the same reasonable basis in proportion to true value as those of other people; that he would have signed anything the assessor handed him; that he absolutely left this matter to the assessor; that he did not know that the assessment was then a proportion of the true value; that he presumed the assessor was treating him like everybody else and that his assessment was on the same basis as others, and that he did not presume that the assessor was showing any favoritism to him, and that his presumption is that the assessor was not showing him any favoritism, but that he was running on the same proportion as other people and his neighbors. An examination of that block or that neighborhood will show whether this was the case. The witness was asked whether or not the "true value" which had been mentioned in his testimony was a proportion of what would be the value of this property, and whether or not that true value would run very much with bank stock, homestead and all property throughout
451 the city, and the witness answered: "Whatever the records show; if it shows a uniform proportion, that is the proportion, whatever it is. Our effort was to get a full rendition." The witness was then asked: "Well, Judge, when you signed these, you knew that these values that you have testified to were not the actual true values."

"A. These assessments?"

"Q. Yes, sir.

A. Yes, sir.

Q. You knew they were not the actual true values.

A. Yes, sir."

That he did not make any examination to see whether he was on the same proportion with others, and that he would not have taken for the property at the time it was assessed the assessments there put on; that he signed it there; that he signed these assessments and knew what was in them; that he felt sure he was getting no better treatment than anybody else; that he could hardly say that he assumed anything; that he signed that assessment and knew that it was not

the full value; that he was not trying to get any unfair or unequal value for himself; that he had nothing whatever to do with the assessment.

452 The witness said that he did not remember whether in 1912 there was a map used in the Assessor's Office to show the various School Districts, nor what was the basis of assessment for any particular district, except that he had in mind the district out about Dairy. That the basis was $15.00. This is in the extreme West end of the County. That it may have been the flat basis. That in 1912 there was a developed farming community at Dairy, but it was swampy until a drainage district was put in. Before that there was some rice development and that the drainage district he thought was installed in 1911, and that he did not think that the values had changed of these lands since 1911. That he had some litigation involving a survey between Dairy and Claudine, a mile West, and valued it at $20.00 an acre, which is split in two by the Railroad and has a station and a county road on it.

That he did not know that the lands around Dairy were worth $30.00 to $40.00 an acre, that is, the improved farms. That he thought the values of real estate had almost stood still since 1912; that by true value he meant what property would bring at private sale in cash or its equivalent. That he knew where the German settlement was in the vicinity of Rose Hill in School District 1; that this settlement ran from Rose Hill to Cypress. That it would be a question picking out a particular farm, to determine the value, that there were miles of white boils not in cultivation, but that he thought the land in No. 1, 5 and 7, land and farms, would run from $12.00 to $15.00 an acre in value. That assessments were not put to 100¢ on the dollar in every instance probably, but that there was no scheme about it to put it at anything less than the real value, and as to whether or not there was a practical recognition of assessments at less than the real value, the witness said that would call on him to testify offhand from a number of volumes of assessments. That the effort was "to put them there," and that the Board relied largely on the Assessor and his knowledge of values, and that the witness did not know that the Assessor took any certain percentage or any

453 definite percentage. That when the full rendition law went into effect the Board recognized that the assessments were from 60% to 70% of the real value and instructed the Assessor to get the full rendition and that he did almost double the old renditions. That as to why his own property was not put at its full value the Assessor would have to be asked, and that if the Assessor had put it in at three times its value he would have said nothing. That he did not know anything about it, and that if there was a scheme it would be disclosed by the record, and that as a matter of fact he did not know what property was assessed at in his neighborhood; never looked at it. That he signed what the Assessor gave him and did not think that he was getting any advantage over anybody else. That he made no entries, that whatever the records show they will disclose. That around La Porte all of the farm houses were vacant before the shell road was built, as the road was impassable from Deepwater to La

Porte; that it was built in 1912 when those lands, some of them were selling very high. That he had heard of transactions at $100.00 per acre along the road. He did not know whether it was cash or what the terms were. That as to Humble and the oil fields, instructions of the Board to the Assessor were to get full value

Redirect examination by defendants:

The witness said that as to bank stock, various elements entered into the assessment, taking into consideration in trying to get its true value. That the assets of the bank were made up of real estate, furniture, fixtures, lands that they might own in this and other counties, as well as the general bank business and good will, undivided profits and also contemplated losses entered in, and that there might be other elements, the witness not being a bank expert. That these classes were taxed and that in assessing bank stock at 70% of its book value, the Board considered the fact that the banks were paying taxes on these other properties, all of which, taken together, would make the value of the bank stock. This was largely attended to by the Assessor, he worked out the details, went over to the
454 banks and went over the matter with them, and the Board largely relied on the Assessor, but the Railroads came more actively before the Board. That if the bank stock had been taxed at its book value and the other properties taxed, then, to an extent, there would be a double taxation and that if a bank had property in outlying counties and its stock had been taxed at 100¢ on the dollar that would have been taxing the real estate in other counties in Harris County, to an extent. That all assessments in 1908 were materially increased, some as high as 50% and the rate correspondingly lowered. That it was many millions.

That he now lives on the lots testified to in Kenilworth Grove; he never got any revenue from them except by living on them. That they cost $3,500.00 and were valued by him at $3,000.00 as actual value.

The witness said that he was not an agricultural expert; that he had heard that small tracts in the vicinity of La Porte had been sold at $100.00 to Northern people on installments and long payments to raise Satsuma oranges on. That they had some pretty little farms, most of the oranges froze he thought. That the McKinstry League lies West of West La Porte and that the high priced land was the bay front, or contiguous to it, bearing a very small proportion, probably ¼ or 1/5 to the whole District, its value being not the productiveness of the soil, but for Summer homes.

Recross by the plaintiffs:

The witness said that his recollection was that the Board in 1912, or thereabouts, in recognition of the existence of these intangible assessments, made an effort to assess the tangibles of the Railroad a little below their true value, and that the assessment made on railroad real estate was considered slightly less than the assessment of the land of the same value belonging to private individuals. The

witness said that he did not know that in assessing the First National Bank stock its building, that is, its office building, was carried
455 into the calculation and deduction given on that real estate, and that that helped to reduce the per cent, but on the contrary, said that his recollection was that there was no deduction made on real estate, and that the Bank's real estate went in the same, on a parity with that of other people. That he did not think the real estate entered into the per cent of 70% of the book value of the stock, or entered into making any deduction. That the last year he was in office was in 1912, going out November of that year. That the improvements on his Kenilworth property cost him about $4,000.00 and the property, without the improvements, $3,500.00, considered by him to be worth, without the improvements, $3,000.00 less the depreciation, and that he considered the value of the property to be now $6,500.00 to $7,000.00, around there. The assessment of this property for 1913 was shown, the witness assessed at $4,500.00, and he stated that he had signed the assessment which was handed him, but that he did not know that there was a system to make it up on a percentage, but that he knew that the Assessor's Office made up these assessments and handed them to the tax payers. When asked whether or not they had a basis, he answered "Oh, yes sir." That he was told that his own assessment for 1913 of the Kenilworth property was the same as the previous year. That his lot in Avondale cost him $1,750.00 and he thought that it was worth that, but it was assessed at $1,000.00. As to whether or not there was a system of the county not to push people to assess money or loans, the witness said that he did not know, that he had no loans himself in 1913. The assessments of the witness on the Avondale and Kenilworth property were shown him to be the same for 1914 and 1915 as for 1913 and he identified them.

He stated that in the majority of cases which he had seen, the Assessor's Office made up the assessments in advance for the people. That most all of the assessments were those made up in advance while he was in office and afterwards, and that the people in the Assessor's Office would know best, of course, as to whether or not there was any system.

There was then shown to the witness the assessments for
456 Harris County of the I. & G. N. Ry. for the year 1912, the last year the witness was in office, and they were stated to total, exclusive of rolling stock, $923,000.00 plus. The witness said that this assessment would be something less than that of the same character of property owned by private individuals. That the aim of the Board was to equalize the real estate assessments, taking into consideration the fact that the intangibles of the Railroads went in at 100¢ on the dollar so that the average between the intangibles and real estate would be the same basis. That he recognized that the tangibles of other people were not assessed at the full value "we probably had not reached the full 100¢ on the dollar."

"Q. Had you reached nearly one hundred cents on the dollar to the other people?"

A. 75 to 80 per cent, that is striking an average through the whole County."

"Q. Then the Board thought they were reaching 75 to 80 per cent. of the true value?

A. We thought we had; yes, sir." That the Board thought that when they had added railroad intangibles and tangibles about the same proportion had been reached for the Railroads, and intangibles being at 100% and tangibles at something less than their values. The witness said that he knew the I. & G. N. depot, occupying two blocks, and valuable property, but that he could not state an estimate of its true value in 1912. That the Board had not intended to take that property and other property of the Railroads and people generally at approximately ½ of its true value, which was considered to be the condition in 1907, that the tangibles of the railroads were taken at something less than 75 to 80 per cent, at least the land. That the lands in the county generally are of private owners and all worked out in an effort to get the full rendition, 75% to 80%, and that taking the railroad tangibles and intangibles together (the latter being at 100%) that would have been an excess over 75% or 80% against the railroads, if their tangibles had been taken at 75% or 80%, and that the I. & G. N. properties in 1912 were taken at a sufficient amount to make up the difference between the 75%
457 and 80%, and the intangible assessment, taking the I. & G. N. tangibles at something, or a little less than 75% or 80%. The witness said that he could not state the exact percentage, but that they took it just as low as the Railroad representatives could talk them down to, and that he thought real estate values in Houston were about the same as in 1912. Assuming that the Scanlan Building, in his opinion, cost $300,000.00 he thought the real estate and the building together would represent half a million or $600,000.00. 85 feet on Main Street, 100 feet back, and that he thought the Paul Building was worth about the same as the Scanlan Building in 1912, but that he thought the Paul Building on a lot 40 feet by 60 feet was probably worth $200,000.00 or $170,000.00 and he thought that it was assessed for $110,000.00 in 1912. Asked whether or not in assessing the building at $110,000.00 when it was worth $200,000.00, he was trying to get the true value, but said that $200,000.00 would be upon the basis of what it would be sold for on a time basis. That it had been recently sold and the Shepherd Estate had a loan on it which they considered 50% of the value. That he had approved the loan as Probate Judge.

At this point the plaintiffs introduced the assessment of the I. & G. N. Ry. Co. as finally approved for Harris County for 1912, and it showed as follows:

Main Line in Harris County 25.2 miles @ $16,648.00 per mile	$419,530.00
Columbia Tap, 13 miles	105,000.00
Forth Worth Division 13 6/100 miles @ $8,250 per mile	107,745.00
Houston Belt & Terminal or Magnolia Park Division 8.2 miles	291,000.00

458 Redirect examination:

On re-direct examination by defendants the witness said that Mr. Shepherd was non compus and his affairs were being handled by the Houston Land & Trust Company, and that a loan had been made out of his estate on the Paul Building of $48,000.00 and Mr. Paul was trying to borrow all he could and thought that the money was used, at least in part, to erect the building.

(24) The defendants next introduced in evidence statement from the report of the I. & G. N. Railway to the Railroad Commission of Texas for the year ending June 30th, 1914, being the list of stockholders contained in such report, and as follows:

"Stockholders June 30, 1914.

Preferred Stock.

Name.	Residence.	Number of shares held.
Executors of Will of Jay Gould, deceased	New York	28,000
Frank J. Gould	New York	6,000
		34,000

Common Stock.

Fred W. Cook	San Antonio, Texas	1
Thomas J. Freeman	New Orleans, La.	1
Frank J. Gould	New York, N. Y.	1
A. R. Howard	Houston, Texas	1
I. & G. N. Corporation of Va.	New York, N. Y.	14,211
Jesse H. Jones	Houston, Texas	1
A. G. Whittington	Houston, Texas	1
Walter Kyle Morrow	Houston, Texas	1
R. Lancaster Williams	Baltimore, Md.	1
Kington Gould	New York, N. Y.	1
		14,220"

It was stated that this was offered principally to show that the I. & G. N. Corporation of Virginia owns all the common stock, except Qualifying Directors' shares.

(25) The defendants next introduced in evidence pages 19 and 21 of the same report as the last.

(Here follows statement showing equipment trust obligations, etc., marked pages 459 and 460.)

FUNDED DEBT - Continued.
Equipment Trust Obligations - A. GENERAL STATEMENT.

Series or Other Designation	Date of Issue	Term	No. of Paymts	Equipment Covered	Remarks
Guaranty Tr. Co. of New York	10- 1-08	10 Yrs	20	Ten 10 Wheel Locomotives built by American Loco. Works and 500 Box Cars built by American Car and Foundry Company	
Blair & Co. of New York	8- 1-13	10 Yrs	20	13 Oil Burn. Consolidation Freight Locos. & Tenders, blt. by American Loco. Works 300 Ventilated Box Cars, built by American Car and Foundry Company 300 Box Cars " " " 400 Stock Cars " " " 200 Gondola Cars " " "	
Industrial Wks. Bay City Mich.	6-18-14	Due 12-14	1	One Wrecking Crane, built by Industrial Works, Bay City, Mich	

B. STATEMENT OF AMOUNT

Series or Other Designation	Cash Pd. on Del. Equipment	DEFERRED PAYMTS-PRIN. Original Amount	DEFERRED PAYMTS-PRIN. Amount Outstanding	DEFERRED PAYMENTS - INTEREST Original Amount	Amount Outstanding	Amt. Accr'd during yr.	Amt. paid during Yr.	Rate	
Guaranty Tr. Co.	47,570.00	380,000.00	171,000.00	108,300.00	21,945.00	11,400.00	11,970.00	6%	
Blair & Co, NY	245,580.00	1,000,000.00	950,000.00	263,500.00	237,625.00	24,968.25	24,875.00	5%	
Industrial Wks., B. City	None	14,100.00	14,100.00	317.25	317.25	23.50	None	5%	
TOTAL,	293,150.00	1,394,100.00	1,135,100.00	371,117.25	259,887.25	36,389.75	36,845.00		

FUNDED DEBT

Mortgage Bonds, Miscellaneous Obligations, and Income Bonds.

Class of Bond or Obligation	Time: Date of Issue	Time: When due	Amount of Authorized Issue	Amount Issued	Amount Outstanding	Cash Realized on Amt. issued	INTEREST: Rate	INTEREST: When Payable	INTEREST: Amt. Accrued during Year	INTEREST: Amt. paid during Year
MORTGAGE BONDS:										
1st Mtg. Gold Bds	11- 1-79	11-1 -79	5,624,000.00	5,624,000.00						
	For reorganization Nov.1 '79 $10,000 Per Mi. Rd. Constructed									
Do	11- 1-79	11- 1-79	2,330,000.00	2,330,000.00	7,953,500.00	Dont Know	6%	May&Nov.	677,430.00	675,945.00
Do	9-1-01- 11- 1-14	11- 1-19	3,337,000.00	3,337,000.00	3,337,000.00	3,955,248.8				
1st Rfdg. Mtg. Gld	8-11-11	8- 1-41	50,000,000.00	13,750,000.00	1,600,000.00			Feb&Aug	None	None
Do	2- 1-13	8- 1-41		506,000.00	506,000.00	455,400.00	5%	Feb.&Aug	35,300.00	35,300.00
Do	2- 1-14	8- 1-41		535,000.00	535,000.00	481,500.00	5%	Feb&Aug.	4,581.25	None
					Interest accrued from Apr. 28 1914, date of sale of bonds					
1st Mtg. Gold Bds Colo. Bdg. Co.,	7- 1-80	5- 1-20	225,000.00	225,000.00	198,000.00	225,000.00	7%	May&Nov.	13,860.00	13,860.00
Total Mtg. Bonds			61,516,000.00	26,307,000.00	14,139,500.00	5,117,146.80			731,271.25	715,105.00
MISCL. OBLIGAT'NS:										
3-Yr Gold Notes,	8- 1-11	8- 1-14	11,000,000.00	11,000,000.00	11,000,000.00		5%	Feb&Aug.	550,000.00	547,375.00
	Issued for road purchased									
Notes Am. Hoist & Derrick Co.,	4-15-14	4-15-15	5,900.00	5,900.00	4,900.00		6%	1 ea Mo.	68.75	7.50
	Issued for purchase one steam Biether									
Total Miscl. Obgn.			11,005,900.00	11,005,900.00	11,004,900.00				550,068.75	547,382.50
Total,			73,521,900.00	37,312,900.00	25,134,400.00	5,117,146.80			1,371,340.00	1,362,487.50
Mortgage Bonds,			61,516,000.00	26,307,000.00	14,139,500.00	5,117,146.80			731,271.25	715,105.00
Miscl. Obligat'ns			11,005,900.00	11,005,900.00	11,004,900.00				550,068.75	547,382.50
GRAND TOTAL,			73,521,900.00	37,312,900.00	25,134,400.00	5,117,146.80			1,371,340.00	1,362,487.50

461 (26) The defendants next introduced in evidence page 47 with instructions for answering questions on page 46 of this report.

462 *Instructions for Answering Questions on Opposite Page.*

There should appear on the opposite page some notation to indicate that the questions asked have not been overlooked. The word "None" may be used for a whole page; or under any column heading; or against any particular item or items, where that word expresses the facts. In other case, refer by note to this page, as for example, "See page 46," where a brief explanation should be given why specific data called for, cannot be returned exactly as requested.

1. From lease of road:

This account includes amounts accrued as rents receivable for property or controlled by the respondent and leased to another Company, the terms of the lease or contract granting exclusive use and control for operating purposes. The total income accrued should be carried to the Income Account on page 33 or 35 and entered as "Rents Accrued from Lease of Road."

2. From joint facilities:

This account is intended for the rental portion only of the joint-facility accounts, and should not include the cost of maintenance, operation or administration of joint facilities as provided for by the Classification of Operating Expenses.

Joint Tracks: Under this heading should be included all rents accrued receivable for the use of joint tracks, including proportion of taxes accrued on such property payable by other Companies.

Joint Yards & Terminals: Under this heading should be included all rents accrued receivable for the use of joint yards terminals and other facilities, including proportion of taxes accrued on such property payable by other Companies.

The total rents accrued receivable for the use of joint facilities should be carried to the Income Account on page 33 or 35 and entered as "Joint Facilities," under "Other Rents."

3. Miscellaneous rents:

Under "Miscellaneous Rents" should be given all rents accrued receivable for use of all properties not otherwise specified under "Rents Receivable" and the total should be carried to the Income Account on page 33 or 35 and entered as "Miscellaneous Rents," under "Other Rents." Only the more important items need be specified. Minor items may be aggregated.

4. Miscellaneous income:

Under this head should be shown all rents of buildings and other property not used directly in connection with the operations of re-

spondent, and all other items of income not specifically provided for elsewhere. The designation of all items included in "Miscellaneous Income," should clearly indicate their character, or else they should be explained under "Explanatory Remarks" below.

All expenses for the maintenance of the property from which miscellaneous income is derived, and the expenses incurred in securing that income, should be stated under the head of "Expenses," and the difference entered in the column headed "Miscellaneous Income." The net result shown in this column should be carried to the Income Account on page 33 or 35 and entered as "Miscellaneous Income." If the net result represents a loss or deficit, it should be entered in red ink and not included in "Other Deductions from Income" on page 58.

(Here follows reproduction of table showing rents, marked page 463.)

RENTS RECEIVABLE

1. From Lease of Road

PROPERTY LEASED	LOCATION OF PROPERTY	NAME OF LESSEE	ITEM	TOTAL
		NONE		

2. From Joint Facilities

PROPERTY LEASED	LOCATION OF PROPERTY	NAME OF LESSEE	ITEM	TOTAL
Joint Tracks:	MK&T Jct. to Austin	MK&T Ry Co of Texas,	43,801.19	
	Anchor to Houston	Houston & Brazos Valley	533.33	43,287.86
Jt. Yds. & Terminals	Houston, Texas,	GH&H RR Co.	14,059.72	
	Hearne, Texas	Hearne & Brazos Valley	150.00	
	Gardendale, Tex.,	S A U & G RR	50.30	
	San Antonio, Tex.,	S A U & G Ry.,	6,800.04	
	McNeil, Texas,	H & T C Ry.,	48.57	
	Laredo, Texas,	Nat'l Rys of Mexico	846.88	31,955.51
		Total,		65,333.37

3. Miscellaneous Rents

PROPERTY LEASED	LOCATION OF PROPERTY	NAME OF LESSEE	ITEM	TOTAL
		NONE		

4. Miscellaneous Income

Source of Income	Gross Income	EXPENSES	Net Misc. Income
Interest on Time Deposits	5,110.58	-	5,110.58
Rents from Misc'l Physical Property	769.25		769.25
Total,	5,879.83		5,879.83

464 (27) The defendants next introduced in evidence, over the objections and exceptions of the plaintiffs, certain pleadings and proceedings in the United States Court in ancillary suit 65, entitled Baker and Lyon, Receivers, and I. & G. N. Railway Company vs. Bagby, Terrell and McKay, constituting the State Tax Board, being ancillary to Equity 49, entitled Central Trust Company of New York vs. I. & G. N. Ry. Co. et al. This ancillary suit was instituted in the District Court of the United States for the Southern District of Texas, and the proceedings thereon were the following:

(*a*) Bill of Complaint filed 5th of July, 1915, the substance of which was as follows:

The Receivers of the I. & G. N. Ry. sued the members of the State Tax Board, consisting of Mr. Bagby, the Tax Commissioner, Mr. Terrell the Comptroller and Mr. McKay, the Secretary of State, and set out that they had been appointed Receivers, as appears above. That the Railroad Company was incorporated and owned 1,106 miles of road in various counties in Texas. That the Judge of the court had given permission to bring this suit by his order of the 5th of July, 1915. Then Chap. 4 of Title 126 of the R. S. of Texas of 1911, was referred to, being the suit providing for the assessment of intangible assets. It was then set out that in Equity 49, a Bill of Foreclosure had been filed and a decree of foreclosure entered for the total sum of $12,908,461.06 with interest, and that the suit was brought to prevent the accrual of illegal taxes. It was then set out that the State Tax Board had assessed intangible taxes, as hereinabove appears, for the year 1915, adopting certain formulas and the proceedings before the State Tax Board of June 18th, 1915, was set out and a recapitulation of the evidence had at that procedure. It was set out that the stock of the I. & G. N. had been valued at a premium of over $8,000,000.00 in order to make such intangibles. That no such intangible value existed and that the Board had not in good faith, and upon any evidence, found the existence of intangibles, and had not made a just, fair, equitable and lawful valuation, and that the Board announced it would certify the intangible valuation made by it unless restrained. Wherefore, the complainants
465 contended that if the court did not intervene, the property would be diverted to the extent of such illegal taxation and taken in violation of Sec. 1 of Art. 14 of Amendments to the Constitution of the United States, and generally in violation of law, and would become a burden and lien upon the physical properties of the Railway in charge of the Receivers, and that the amount of taxes which would have to be paid would be over $100,000.00. That the suit was brought to prevent a multitude of other suits in the different counties, to-wit: 38 suits. The Complainants contended that there were no intangible values, but if there were any, then far less than the amount sought. The Complainants prayed for writ or writs of injunction, or such as may be necessary upon equitable conditions to restrain the State Tax Board and all persons acting under or for it, from certifying or apportioning the assessment to the Assessors of the different counties until the further order of the court, and

that a temporary restraining order be granted at once against all of the defendants until the further order of the court, and that upon a hearing the court grant an injunction until the final hearing of the case, and that upon a final hearing the State Tax Board and those acting under it, be forever restrained from certifying such alleged intangible values. It was prayed that the defendants be compelled to answer, but not under oath, and finally, that not only a temporary restraining order or orders be granted, but that writs of subpœna be granted and writs of injunction conformable to the prayer of the Bill. This Bill was sworn to.

(*b*) The court made an order of the date of the Bill stating that the Bill had been presented to the court and that the Central Trust Company of New York had appeared before the court and assented to the filing of the Bill and that the court, being of the opinion that the assessment of illegal taxes would cast a cloud upon the properties, and that if the Bill be not entertained before certification, it would be necessary to pay such taxes, or to sue in all the
466 numerous counties, it was ordered that the Complainants be permitted to file the Bill.

(*c*) The court granted a restraining order dated the 5th of July, 1915, and directed its service upon the defendants. It recited that it had been made to appear upon the Complainants' Bill, and by the affidavits attached, that a writ of injunction "preliminary to final hearing upon the above cause may be proper, and that prima facie Complainants are entitled to an injunction and restraining order in the form of and as a restraining order, enjoining the defendants herein from acts complained of and threatened to be committed; it being made to appear that immediate and irreparable loss will result before the defendants may be heard on notice." Therefore, on the motion of the Complainants, the defendants were individually and officially directed to appear before the court at Houston, Texas, on the 15th of July, 1915, at 10 o'clock to show cause "if any they have, why the preliminary injunction prayed for in the Complainants' Bill should not issue." And furthermore, the defendants, as constituting the State Tax Board, and in their respective official capacities, and all persons acting under them, were restrained from certifying to any County Assessor any intangible values found by them until the further order of this court and the Clerk was directed to certify this order, and that it should be served. This order was duly served and on the 15th of July, 1915, the defendants appeared in Houston before the Federal Judge.

(*d*) The defendants filed on the day when the hearing commenced, July 15, 1915, a motion to dismiss the Bill of Complaint on the ground that the Court had no jurisdiction, and demurring to the Bill in effect, and setting out that the Bill was insufficient, and also that the State Tax Board is an inferior tribunal, subject to the control of the State courts, and that therefore its acts could not be taken to deprive the Complainants of the equal protection of the law, or of due process of law, and that if the State Tax Board had acted illegally,

they had violated the State Law, and that there could be no question of the Federal Law.

467 (*e*) The defendants also, on July 15, 1915, filed an answer which set out as follows:

The members of the State Tax Board, A. P. Bagby, Jr. Tax Commissioner, H. B. Terrell, Comptroller and John G. McKay, Secretary of State, made answer as follows, as far as necessary to be stated.

They generally demurred to the Bill and furthermore set up as to that portion of the Bill alleging that the State Tax Board had acted on the formula set out, and was contrary to law, attempting to levy a tax in violation of the equal protection of the law, and of Sec. 1 of Art. 14 of the Amendments to the Constitution of the U. S. that it was insufficient.

Also they demurred that no facts or data was alleged to show that the methods of the State Tax Board operated inequalities and irregularities as between the Complainants and other Railroads not managed by them, and as alleged in the Bill.

They also demurred that the Bill was insufficient in its showing to confer jurisdiction, in that it did not appear that Complainants had been unlawfully discriminated against, and in that no Federal question was presented.

And further, they demurred on the following grounds:

"(*b*) It being the duty of the State Tax Board to place a valuation upon all the property of the Complainants not otherwise assessed, as is manifest from the statute creating said Board and under which it is operating, under the general term 'intangible properties'; and it appearing from the Bill that the true, taxable value of the 'entire property of the Complainants is the sum of $24,627,453 and that it is proposed to place this valuation upon the Tax Records, through the complemental action of the State Tax Board and the various County Taxing Officials; said Bill is insufficient in that it does not show that the real value of all of the property of the Complainants within the State and subject to taxation is less than the sum of $39,116,033.00. And in this connection reference is here made to the matters set forth in Paragraph V hereof, and the Court is asked to consider the same as fully as if set forth here in full."

The defendants also demurred on the ground that no complaint is made against the law under which the State Tax Board is operating, whereby it appeared that the Board is an inferior tribunal, subject to the control of the State Courts, and whereby the acts of the Board cannot be held to be the acts of the State so as to deprive the Complainants of due process or equal protection of the
468 law until it appears that the acts of the Board have been sanctioned by the Supreme Court of the State and a test of their legality in the State Courts, the allegations of the Bill being, in effect, that the State Tax Board had acted illegally and in violation of the State laws, whereby there could be no violation of the 14th Amendment to the Constitution of the United States, wherein

the State, not an individual or individuals, is prohibited from taking property without due process of law.

It was also contended that the Bill was insufficient, because it appeared therefrom that the property was assessed at $28,372,810.00, whereas the value of the same is at least $34,013,092.07, whereby it appeared that the Complainants had not done equity, and therefore were not entitled to equity.

Subject to these exceptions and demurrers, or motion, whatever they may be considered, the defendants denied that illegal taxes had or will accrue, or that an illegal assessment had been made, and that the Board did not endeavor to bring about a just, fair, equitable and lawful valuation, and denied that the Board endeavored to create fictional, intangible property, and denied that it acted contrary to all evidence. Also it was denied that values had not been explained, and the road built up within the last few years, by additions and betterments, and denied that the Board did, by a calculation erroneously and deliberately, and with gross disregard of the facts, find the existence of the intangible value, as claimed, and they denied that the Texas & Pacific Ry. is far more prosperous than the I. & G. N. and denied that there were any inequalities or irregularities in the methods of assessment, as between Complainants and other Railroads, and denied that the methods were arbitrarily applied, and denied that the Complainants offered to the Board all the information they had, and stated that they did not interpret the terms "physical values" "intangibles" as Complainants have interpreted them in the Bill, and stated that they did not have the information enabling them either to admit or deny the allegations of the Bill that the railroad properties for the last fifteen years had never paid dividends on their stock.

469 They denied that the intangible assessment made was completely disproved by Complainants' evidence before the Board and other facts known to the Board, and that the Board was unwilling to pursue a legal method to settle this matter, and that the Board did act against all evidence and by a false formula, and did not act with the purpose of finding a just, fair, equitable and lawful valuation, and denied that the formula used was illegal, and all of the acts of the Board illegal and inequitable, and denied all irregularities charged against them.

Specially pleading, the defendants set out in Sec. V as follows: That by Sec. 1 of Art. VIII of the Constitution of Texas, it was required that all property should be taxed in proportion to its value, the value to be ascertained as provided by law, and that this provision was in force before the Railway or its predecessors in interest existed. It was then set out that the Legislature, in pursuance of the Constitutional demand, had enacted elaborate laws, changed from time to time as its imperfections were discovered, to carry into effect the provisions of the Constitution, among which are R. S. 7515, 7524 and 7525, which were quoted. That R. S. 7525 provides for a sworn statement by the Railway to the Tax Assessor of the County to be submitted to the Equalization Board, and that the Supreme Court of Texas had held in State vs. A. & N. W. Ry. Co.

94 Tex. 530, that it was the intention of the Legislature to require rendition of railway property at its full real value, including all franchises and privileges and advantages of its profitable prosecution, and that it was not the intention of the Legislature to authorize and direct the tax upon railway intangibles to be separately levied from the tangibles, but that after the statutes had been in operation many years it was found that a large part of the Railway properties were escaping taxation. For illustration: The defendant was rendering its physical property in the counties in 1914 at less than the aggregate sum of $15,000,000.00 while claiming, as in many years past, for rate making and bond purposes, that the value of its prop-
470 erties exceeded $40,000,000.00, its books showing a value in excess of $43,000,000.00, and also that it was discovered that the physical properties, through their correlation and assemblage into one enterprise, gave rise to an additional value, and that the Legislature, having these imperfections in view, in 1905 "complemented" the aforesaid statutes by the enactment of the Intangible Tax Law, amended in 1907 and as amended, being now the law that the Act of 1905 provided for the valuation of the non-assessed property in the following way, to-wit: To find the true value of the entire property by any method which, under the circumstances, the Board believes best calculated to bring about a fair and equitable valuation, and that next to ascertain the value at which the property had been assessed in the various counties and then subtract the assessed value from the true value and the result to represent "the additional value to be taxed under the general and undefined term 'value of intangible property' ", but that the Act of 1905 permitted the Board to disregard the assessed value, if some other method was better suited to accomplish the purpose, and that the same Legislature in 1905 levied an Occupation Tax of 1% on the annual gross receipts of railroads. But that the Legislature in 1907 commuted the occupation tax in favor of those railroads paying the tax levied upon the intangibles, but not in favor of those not paying such a tax, and amended the intangible tax law, among other things, doing away with the suggestion that the Board might take the assessed value as the true value of the physicals and leaving it to the discretion of the Board to adopt such method to find the true value of the entire property, and the true value of the physicals as it might see fit, but that the result of the subtraction of the true value of the physicals from the true value of the higher property "was to represent the valuation to be taxable under the Act, under the general term value of intangible property." That the purpose of the Legislature of 1907 was to supplement the old statutes providing for the taxation of the purely physical property "and to cause every element of property held by the railroad companies, by whatever name, of
471 whatever character, to be taxed, this purpose being manifest from the statutes themselves, and so construed by the Supreme Court of the State in case of M. K. & T. Ry. of Tex. vs. Shannon, 100 Tex. 379."

In Sec. VI of the answer, it was stated that the I. & G. N. Ry. ran into 38 counties, and that Complainants had made sworn renditions

of their property in each county, which was required to show the full values, but that the aggregate of such sworn renditions, including rolling stock, for 1915 was $14,926,122.10, which renditions did serve as a basis for the assessments in the various counties, and were so intended, and were reported to the State Tax Board under oath, and that Complainants reported to the State Tax Board that the true value of all its physical properties, exclusive of rolling stock, was $26,026,810.78 and the total assessed value of the rolling stock was $2,346,992.00, the true value of the rolling stock not being stated—or a total valuation $28,372,810.00, and that this was reported to the State Tax Board in giving an account of the renditions and assessments for 1914, the report being made to the State Tax Board in 1915, and that the State Tax Board took this report as one of the factors in the calculation made by it, and that the sum of the valuations in the various counties was and is less by many millions of dollars than the total true values of the property, and that "but for the valuation by the State Tax Board, all of this excess of value would escape taxation altogether."

In Sec. VII of their answer, the defendants set out that under the Constitution and laws, all property of the Complainants "whether called arbitrarily "tangibles," "intangibles" and "mixed" is subject to taxation, it being the lawful purpose of the Legislature by its statutes, to secure the placing of all property upon the Tax Rolls, and all elements of property not otherwise assessed, and that the method of calculation, or formula used by the State Tax Board in arriving at this valuation is wholly immaterial, so long as the final valuation does not result in placing a total valuation on the Tax Rolls unreasonably in excess of the true value of all property
472 subject to taxation, and that if any mistaken method or formula was used by the Tax Board (which was not admitted but denied), that this fact in itself would not justify the court in finding the result reached as incorrect or unlawful, unless the Complainants could show that their total properties "of all kinds, through the act of the Board, as supplemental by the assessments in the various counties, will be subjected to taxation unreasonably in excess of their total real values; this allegation Complainants have not made, and it would not be true if made, but, on the contrary, Defendants say, the total value of all the properties of the Complainants within the State, and justly subject to taxation, far exceeds the aggregated assessment thereof by the various county taxing officials and the State Tax Board. And in this connection Defendants show unto the Court the following, in addition to the matters of fact hereinbefore alleged, to wit."

It was then alleged that the total valuation of all of the properties, including the intangible assessment for taxation, is $24,627,433.00; that the book cost of the properties to June 30th, 1914, was $43,818,430.79 and then that in 1911 the Company desired to issue bonds for the amount of $35,000,000.00 and represented to the Railroad Commission, in promotion of that desire, various matters, as appears in the letter from T. J. Freeman to the Railroad Commission hereinabove set out.

The defendants also set forth that the Complainants had other large property values, to wi· A contract with the Wells Fargo Express Company, with the ' ited States Postoffice, with the Pullman Company and a forty yea. contract with the G. H. & H. R. R. Co., the value of which contracts *were* alleged to be very large, and also that it had valuable terminals and properties in Harris County, including the Magnolia Park Railroad Division of very great value, and worth over the assessment thereof, $1,500,000.00 and that it had terminals and yards and other properties in Waco, Ft. Worth, Tyler, Longview, Mineola, and a contract with the M. K. &
473 T. Ry. whereby that Road was its tenant between San Marcos and Austin, that its tracks and properties had become seasoned, that it had good will of great value, and that by reason of the assembling of all these faculties together, great values had rest d to the Railroad, and furthermore, that the properties conside . have a tangible value independent of and in addition to the purely physical properties which escape taxation, except as it may be included in the final val· ions of the State Tax Board, and is incapable of exact ascertainment, but that the Legislature in 1905 had levied an Occupation Tax equal to 1% of the total gross income, and that the average total gross income for 1911, 1912, 1913 and 1914 of the I. & G. N. properties had been $10,396,079.00, and that upon this average at 1% the Complainants would have had to pay $103,960.79, but that this tax had been commuted, with the intention, upon the part of the Legislature, that occupation should be included in the final valuation of the State Tax Board, and that such valuation, among other things, should result to produce the amount that would otherwise have been due as an occupation tax by that name, that the State Tax rate for 1914 was 37½¢ per $100.00 and that the capitalization of the average payment upon the occupation tax at that rate would show the sum of $27,722,666.66 as the valuation of the occupation tax for taxing purposes, and that the value of the occupation far exceeds the final valuation made by the State Tax Board, and that the taxable value under the occupation tax law and the taxable value by the final estimate of the State Tax Board as intangibles are approximately equal, the average gross income being $10,396,079 and the taxable valuation by the Board being $10,743,223.00.

In Sec. VIII the defendants set out what they state was a true statement of the stocks and bonds and lien indebtedness of the I. & G. N. Railway:

(*a*) *Capital Stock.*

Authorized	$6,500,000.00	Common,
	5,000,000.00	Preferred.
Outstanding	$1,442,000.00	Common,
	3,400,000.00	Preferred.
	$4,882,000.00	

474 (*b*) *Bonded Debt and Other Obligations.*

First Gold, 6% Bonds.....	$11,291,000.00,	outstanding;
Colorado Bridge. Sinking Fund Gold Bonds.....	225,000.00,	"
First Refunding, 5% Gold Bonds...	2,641,000.00,	"
	$14,157,000.00	

(*c*) *Additional to the Above.*

The Company has an authorized issue of $50,000,000.00 5% Gold Refunding Bonds, of which $11,489,000.00 is reserved to retire prior liens:

Of said $50,000,000.00 authorized issue, $13,750,000.00 (including $1,600,000.00 of the $2,641,000.00 "outstanding" bonds mentioned above were purchased by a syndicate for cash, of which $12,150,000.00 are pledged as security for the three-year 5% notes described below; $506,00- of bonds were issued in February, 1913 and $535,000 in February, 1914, for additions and betterments; and $23,720,000.00 of the issue are reserved to provide funds for construction, improvements, additions and equipment.

On or about August 1, 1911, $11,000,000.00 of Three-year-5% Gold-Notes due August 1, 1914, were issued and are now outstanding against the properties of Complainants, plus interest accrued thereon, at least, to August 1, 1914, (Principal and interest defaulted). These notes are secured, amongst other ways, in the manner described in the last succeeding paragraph above, and by reason of the nature of the security the notes constitute, at least, an indirect lien upon the properties.

Recapitulation of (c).

Direct Lien Indebtedness	$13,750,000.00
	535,000.00
	506,000.00
	$14,791,000.00
Indebtedness (3-Year Notes), secured by Bonds issued and outstanding, and, therefore "secured by any mortgage, lien or other charge upon—property or assets" (within the meaning of the tax statute)	$11,000,000.00
Plus accrued interest (calculated to August 1, 1914)	$550,000.00
	$11,550,000.00
Total (*c*)	24,741,000.00
(*d*) Totals (*a*), (*b*)	$43,780,000.00
(*e*) *Add to* (*d*) face value of "Interim Certificate," mentioned in Paragraph VIII-(2), which is counted as a liability by Complainants	5,078,000.00
Totals (*a*), (*b*), (*c*) & (*e*)	48,858,000.00
(*f*) Equipment Trust obligations, Page 21, Exhibit No. 1	1,135,100.00
Grand Total	$49,993,100.00"

475 It was then set out that this amount represented the judgment of the Complainants as to the value of the Railroad and should be considered the minimum of the true value.

Also in Section VIII the defendant set out that there had been Interim Certificates issued in the form above appearing herein to the amount of $5,078,000.00, being 50,780 shares thereof, and that the interest of the stockholders in the stock of the sold-out I. & G. N. Railroad had not been wiped out, but carried forward in 1911, and that these matters show the opinion of the Complainants, and those who hold the Interim Certificates; that the property of the Railroad has a real value over the total capitalization as stated above.

The defendants, in Section IX set out the comparative general balance sheet hereinabove appearing, as of June 30th, 1914, and stated that there was included in the statement of balances in the item "Other Deferred Credit Items" are $5,290,677.00, the Interim Certificates to be considered in determining the above valuation made by the State Tax Board.

In Section X the defendants set out: "Defendants, therefore, allege that the true taxable values of the entire properties of the Complainants within the State far exceeds the sum of $24,627,-433.00, the amount of such values that will be subjected to taxation by the complemental action of the State Tax Board and the various

county taxing officials, and that the value of said properties, subject to assessment for taxation by the State Tax Board, "under the general and arbitrary designation" of "value of intangible properties" far exceeds the sum of $10,743,223.00, the amount of the final valuation thereof by the State Tax Board."

In Section XI the defendants allege that the final valuation of the intangible property values of the Complainants by the State Tax Board had been as follows: 1907, $15,921,425; 1908, $14,455,-420; 1909, $14,488,600; 1910, $14,488,600; 1911, $14,488,600; 1912, $14,488,600; 1913, $14,488,600; 1914, $14,488,600; 1915, $10,743,223. The valuation for 1915 being a reduction from the valuation of 1914 of $3,745,377.00."

476 In Section XII it was set forth that the defendants had attempted to faithfully perform the duties encumbent upon them so as to arrive at a just, fair, equitable and lawful valuation of the intangible properties. That they had carefully considered all evidence, and that the final result as made by them they believe to be correct, and that the same is in no sense an excessive valuation.

This answer was sworn to by the defendant A. P. Bagby, Jr., State Tax Commissioner, as follows:

"I, A. P. Bagby, Jr., who, as Tax Commissioner of the State of Texas, is one of the Defendants in the above entitled and numbered cause, do solemnly swear that I have read the above and foregoing answer therein, and that the statements of fact therein contained are true and correct, and that the statements made upon information and believe therein I have good reason to believe and do believe are true.

A. P. BAGBY, JR.

Subscribed and sworn to before me on this the 14th day of July, A. D., 1915.

W. DUMAS,
Notary Public,
Travis County, Texas."

477 (*f*) On the 19th of July, by consent of the Court, the Complainants filed a supplemental Bill in which they realleged the allegations of the original Bill, and set out that they had demanded the formulas applied by the State Tax Board to the various Railroads of Texas, and had only obtained them during the trial, and that it appeared that various methods were used, and certain railroads favored over the International & Great Northern Railway, and analyses were made of the findings and formulas adopted by the Board hereinabove appearing in evidence as to the various other Railroads, and claim made that discrimination had been exercised as against the I. & G. N. Ry. and that there were apparent gross discriminations which had been made in violation of legal and statutory rights of the Complainants.

(*g*) Also on July 19th, 1915, during the hearing the Complainants filed a supplemental bill in reply to the allegations of defendants' answer set out above, and as follows:

Complainants set out that the laws of Texas do not authorize the taxation of physical values situated in any county under the form of intangibles by the State Tax Board, as claimed in Sec. 5 of the answer, and that no one was required, in rendering property for taxation in the counties, to make affidavit to the value of the same, and that Complainants have not done so, and that the Constitution of Texas provides that all property shall be taxed in proportion to its value, and that it was the right of Complainants to render property at no greater proportion of true value than was assessed generally in the particular county, upon other property, and that the Complainants had rendered as great a proportion in each county of the physical values of the Railroad, and at as much or a higher rate than was exacted generally in said county, of persons owning property therein, and that Complainants had in all cases, paid taxes on their physical values on as high value as could lawfully be required. This was in reply to Sec. VI. of the answer. Complainants denied that the sum of the values used by them in the various counties is less than the amount on which they are required
478 to pay taxes, but is as large or larger in proportion than the renditions and assessments of other persons and property owners in the various counties, and at least in the same proportion as such other persons. The Complainants admitted that the book cost of the property, as shown by their records, up to June 30th, 1914, was $43,818,430.79, but that a great deal of this book cost had been lost by depreciation or otherwise wiped out.

Replying to sub-section 3 of Sec. VII of the answer, Complainants said that they were not informed of the terms of the alleged report made in 1911 to the Railroad Commission of Texas, and denying the same, but that they insist that whatever reports were made by Judge T. J. Freeman in an argument filed by him, with the Railroad Commission for the purpose of obtaining a higher physical valuation; that if these alleged values existed, they were physical values and not assessible as intangible values.

As to the allegations in sub-section 5 of Sec. VII of the Answer, the Complainants admit that they had a contract with Wells Fargo & Company, but that it involves expense and loss as well as profit. That they have a contract with the United States Government Postoffice Department involving expense and loss, and very doubtful in profit. That they have a contract with the American Refrigerator Transit Company and the Pullman Company, these contracts involving both expense, liability and profit. That they have a contract with the Galveston, Houston & Henderson Railroad; that the Railway has valuable terminals in Houston and other terminals elsewhere, and that they have a contract with the M. K. & T. Ry., that Railway being a tenant of the I. & G. N. between Austin and San Marcos.

With respect to Sec. VII and sub-sections 3, 4 and 5 the Complainants contended that if terminal facilities were reflected in the

intangible values, it would appear in the profits, and admitted that it was the intention and purpose of the Tax Board, as plead in the answer, in collecting intangible taxes, to make them the substitute for the 1% gross income tax, to some extent, but contended
479 that the statute did not so authorize, and as to the contention of the defendants that the words "tangibles" and "intangibles" were arbitrarily used in the statute, and that it was the purpose of the intangible assets tax suit to place on the rolls every element of the property by whatever name known, it is admitted that this was the construction and intention of the Board. Complainants denied that the interim certificates constituted a part of the capital or had been valued by the Railroad Commission, and denied the correctness of figures and deductions made therefrom set forth in the answer.

(*h*) Upon the hearing commencing on the 15th of July, the Complainants introduced a history of the proceedings before the State Tax Board and the various formula introduced on this trial and evidence bearing upon the value and history of the Railroad and properties and testimony that the physicals of the properties were assets at not a less proportion of value than the physicals of other property owners in various counties.

(*i*) On July 20th the Federal Judge made an order of which the following is a copy:

"In the District Court of the United States for the Southern District of Texas, at Houston.

No. 65. Equity.

JAMES A. BAKER and CECIL A. LYON, Receivers I. & G. N. Ry. Co., and INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY

vs.

A. P. BAGBY et al.

On this day again came the parties to this cause and all parties announcing ready, thereupon, the hearing was resumed before the Court;

And the Court having heard the pleadings and the evidence in support thereof is of the opinion that the Order Permitting Complainants to file their Ancillary Bill in this cause was improvidently entered, and the same is hereby withdrawn.

It is further Ordered that the Complainants' Application to Amend their Bill, this day presented in open Court, after the conclusion of the evidence, be and the same is hereby denied.

W. T. BURNS,
Judge."

(*j*) And having made this order, also entered the following order:

"Above styled and numbered Cause came on to be heard
480 by the Court on the Bill, Answer, Replication and Proofs on the 15th day of July, A. D. 1915. The Court having heard and considered the pleadings, evidence and argument of Counsel, is now on this, the 20th day of July, A. D. 1915, of the opinion that the prayer contained in the Bill of the Complainants, praying that this Court enter an order "prohibiting and restraining" the Defendants," and each of them, from certifying to the various County Tax Assessors as provided by law, and apportioning among the various Counties the intangible values found by them (Defendants) to exist in connection with, and as a part of the values of the International & Great Northern Railway Company or any part thereof or any intangible values until the further order of this Court, and pending this suit," and other relief, should be in all things denied.

"It is therefore ordered, adjudged and decreed by the Court that such prayer and application be, and the same is hereby in all things denied, to which action of the Court, the Complainants, in open Court, duly excepted.

"It is further ordered, adjudged and decreed by the Court, that the Defendants do have and recover of and from the Complainants all costs in this behalf incurred.

W. T. BURNS,
Judge."

(*k*) The preliminary restraining order of July 5th, 1915, had directed the defendants to appear before the court at Houston, Texas, "upon the 15th day of July, 1915, at 10 o'clock of said date, then and there to show cause, if any they have, why the preliminary injunction prayed for in the Complainants' Bill should not issue."

(*l*) On November 5th, 1915, the court made the following order:

"On the Motion of Complainants, it is ordered and decreed that the above styled case be dismissed without prejudice to the litigation by Complainants of the matters therein involved.

"It is further ordered that the Complainants herein pay all costs herein incurred.

W. T. BURNS,
Judge."

(28) A. P. BAGBY, Jr., was called by the defendants, and on examination by the defendants, testified as follows:

That he has lived in Texas all his life, and is now Tax Commissioner of the State, and has been since in January of 1915, his predecessor ing A. L. Love, and that his duties in a general way, were t .d the intangible assets of certain corporations and make reports .o the Legislature on the Tax laws of the State, and that the different Railroads make reports to the State Tax Board, and that the Board gathered all the information it could from all sources,

and at times examined the reports filed with the State Railroad Commission and other public records bearing on the subject, and read all the text books on the subject which they could get, but had not been able to listen to any discussions on the subject. That
481 when he first went into the office he invited two of the Railway Attorneys of the State of Texas, and the different Ex-Tax Commissioners of the State to discuss the subject with him, to-wit: Messrs. Garwood and Glass and Mr. Love, Ex-Tax Commissioner, and also Mr. Davey. That he had acted in good faith, and tried to get all the information, he could as to what the intangible assets of the Railways were and had tried to study the statute. That in any mathematical calculation or formula, the two main factors which he had endeavored to find in order to arrive at the value of intangibles, were the real value and the physical value of the Railroads, that is, the real value of the entire property as a whole, and that he had done this in the case of the I. & G. N. Railway in connection with its valuation for 1915, and that the valuation found by the Board of $39,000,000.00 plus represented his best judgment as to the true value of the entire properties upon all the information which he had before him, and that the facts showed that that was the proper valuation in the judgment of the court, and that he was under no coercion from any source in making that valuation, and that it was hard to get anybody to discuss the intangible matters with him, and that the valuation of the property for the I. & G. N. for 1915 took into consideration the mathematical calculation used, and that disregarding the mathematical calculation and looking only to the result, that the valuation reflects the best judgment of which the witness was capable under all the information he had, and that he saw no conduct upon the part of any other members of the Board indicating that they were not exercising their best judgment, and so he would say the same as to every one of the Railroads. That the representatives of the I. & G. N. Ry. had appeared before the Board on June 18th, 1915, but that these representatives did not offer the Board any facts not disclosed by the records already before the Board. That their representations consisted partly of facts and partly of arguments, with perhaps three witnesses, the Auditor, the Tax man and the Head of the
482 Traffic Department testified, but what they said did not change the opinion of the Board, and that as far as he was concerned, he went into the hearing with an open mind and gave a patient hearing, or tried to.

Cross-examination.

By the Plaintiffs:

The law says that the intangible assets of a railroad is the difference between its physical value and real value, or in other words, is the metaphysical value, if any. The witness said that he was a fairly good arithmetician and fairly well knew the "rule of three" and common and decimal fractions. The witness then testified the vari-

ous formula which had been introduced in evidence from each Railroad emanated form the State Tax Board in 1915, and stated that he, for the most part, made these calculations based upon a formula of the T. & P. Railroad with the assistance of his associates. That they first got gross receipts of the T. & P. Ry. for four years, divided that by four, then got the total of the capital stock in bonds and found the ratio between the gross receipts and the capital average gross receipts and the capital stock and found it to be 12½ or 12.48, that is ⅛. That then they took the capital stock and multiplied it by 12½ or ⅛, that is, by .125. That it was first found that the T. & P. was the only Railway in the State that had a marketable value for its stock, the Wall Street Bulletin showing a quotation on it at either 12½ or 16¢ on the dollar. That then the Board took the capital stock and multiplied it by 12½ and found out what they thought was the real value of the T. & P. and added the bonded indebtedness to this real value of the T. & P. capital stock and took that for the total true value of the Railroad and then subtracted the physical value and took the balance for the intangible value.

Coming now to the I. & G. N. Ry., the witness stated that he found the average gross receipts for four years then the difference between the bonded indebtedness and then applied the T. & P. formula
483 and multiplied the difference of its ratio between the capital stock and divided by 12½. The gross receipts for four years were $41,000,000.00 of the I. & G. N. Ry. divide it by four and it averages $10,000,000.00. The capital stock issued and outstanding, is $4,822,000.00 and the mortgage debt at par was $26,000,000.00 in round numbers, or in round numbers about $31,000,000.00 for stocks and bonds. That then they divided the average gross income of $10,369,000.00 into the $31,000,000.00 and that gave the ratio of the capital stock and gross receipts, and "we divided then the ratio of the capital stock of the I. & G. N. Ry. and gross receipts, the ratio of the T. & P. was 12½." That would make the average of 2.6 and we multiplied the $4,822,000.00 by that and added the mortgage debt at par, then subtracted the physical valuation of $28,000,000.00 and there was left an intangible valuation of $10,743,000.00.

In the case of the T. & P. the ratio between the capitalization and average gross income was found to be ⅛. Therefore, to determine the value of the capital stock of the T. & P. the par of the stock was multiplied by ⅛, which is the same as multiplying it by .125, whereby the capital stock of the T. & P. was put down as worth $4,845,476.00. He pursued the same method as to the I. & G. N. Ry., he had divided its average gross income for four years by its total capitalization, which gave the ratio of a little more than ⅓ or 33.53, but that the Board divided the capital stock of the I. & G. N. by ⅓ as in the case of the T. & P. and multiplied by 33½ and divided by 12½. He did not divide the capital stock of the I. & G. N. by this ratio, but multiplied the difference of the ratio of the gross receipts and its capital stock, but did virtually, in effect, pursue the same method as in the case of the T. & P., that is, virtually divided

the capital stock of the I. & G. N. by its ratio. "You can either do that, 12½ you know is ⅛, and you can either multiply or divide it and then multiply by the 33.53." That it was his intention to treat the I. & G. N. just like the T. & P. according to the ratio of the gross receipts, but the witness said that it was this way:
484 he wanted to "sort of qualify himself." That the Board could get the quotation of the T. & P. stock, he could not of any other Railroad, as it alone had a market quotation, and that the ratio of its gross receipts to the capitalization was 12½ virtually, as well as he could remember the market quotation on the stock, that is, 12½¢ on the stock. That the ratio of the gross receipts to the capitalization and the stock was about the same, that the Board then went ahead and found the difference between the ratio and the gross receipts and the capitalization of other Railway Companies as far as it could, and that the ratio of the gross receipts to the capital stock of the I. & G. N. was 33½, which would make it more than the ratio of the T. & P. Then that the Board multiplied that by 12½ and found out what it said the capital stock of the I. & G. N. was worth. That the proportion between the average gross income of the T. & P. and its capitalization was one-half and the proportion between the average income of the I. & G. N. and its capitalization was ⅓, and that in order to get the true value of the T. & P. stock he had divided this stock by 8 and reduced it from $38,000,000.00 odd to $4,800,000.00 odd, and that he had divided the capital stock of the I. & G. N., to get its value, by ⅓ and had multiplied by 12½ and did not divide it by ⅛ alone to get its value. That he Board found that the T. & P. capital stock was worth, he thought, 12½ and that the proportionate part of its gross receipts to the capital stock averaged about 12½, and that this was a confirmation, that the gross receipts would show what the capital stock was worth, and that the ratio of the I. & G. N. was 33.53, and that 33.53 is to 12½ as 10 million is to the answer. That 12½¢ on the dollar was the market value of the T. & P. shares. Its proportionate part was 12½, and to arrive at an answer we would have to say that 33.53 is to 12½ as $4,822,000.00 is to the answer, and that that was the theory of the Board to find the value of the stock of the I. & G. N. Railway, and explained his process, subject to cor-
485 rection, of any error in the figures. That on account of the gross receipts of the I. & G. N. Ry. being, in proportion to its capitalization, so much higher than those of the T. & P., the capital stock of the I. & G. N. was taken to be at its true value, not ⅓ of its par, but 2.68 times its par, and that the witness did not think that the same plan would have been pursued as in case of the T. & P. by dividing the capital stock of the I. & G. N. by ⅓ instead of multiplying it by 2.68. That circumstances altered the cases. That the "rule of three" explains the whole matter, that the correct way of getting at the value of the T. & P. is this: .125 is to .3353 as the capital stock of the I. & G. N. to-wit: $4,822,000.00 is to the answer. The witness stated that he had submitted the formula to Mr. Doughty, the Superindent of Public Instruction, as to the correctness thereof, and that Mr. Doughty agreed with him that it was correct as to the matter of figures. That the Board never intended making the capi-

tal stock of any Railroad at any certain figures, as it could not do that, but that it tried, to a certain extent, to treat all railroads alike, and did try to treat them all justly. The witness was asked why, if the capital stock of the T. & P. was depreciated 7/8 because of its ratio of 1/8 why the capital stock of the I. & G. N. should not be depreciated 2/3 because of its ratio of 1/3 and answered, the amount of money the different Roads had invested and the amount of business they did made it different. That if the I. & G. N. Ry. with the amount it had invested, would be worth 33½, then the difference would be that; that the T. & P. had invested, say $95,000,000.00 with a market quotation on their stock of 12½ that the I. & G. N. proportion of their capitalization to their gross receipts showed .3353 or 1/3. Then to find the difference (the I. & G. N. has no market value on its stock) then to find what the capital stock was worth according to the T. & P. quotation, we say that as 12½ is to 33½, so $4,822,000.00 is to the answer.

"Q. Now, Mr. Bagby, you have stated the theory on which you worked your formula and you applied that formula to the I. &
486 G. N. and the result of that formula, you and your associates say, shows as our intangibles?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. You found these intangibles to exist, therefore, it follows, by the application of that formula?

A. Yes, sir."

The witness further stated that he had made a preliminary assessment of the I. & G. N. Ry. as shown in the evidence, and by the first formula, which has been introduced, wherein the physical values of the Road were stated at $30,444,000.00; that in the final formula this physical valuation was reduced to $28,000,000.00 odd, but the witness said that he could not now remember why that was done; that these were supposed to be private memoranda and not public property, and that he did not remember, under the circumstances, and that all of these formulas were private papers, that he had understood from the Tax Agents that the previous State Tax Boards would give*n* them no reason, or explain how they found the intangibles, but that he made up his mind when he was appointed, to try to do the best he could, and to give some reason, and that when the different Tax Commissioners came in and asked how he arrived at these intangible assets he would show them the formula, but that he had given these formulas, the first and second one, to the I. & G. N. people. That they came to see him and that he handed them these formulas, that there was an error in the first formula, not in the final one, that the Board held two meetings, one its preliminary meeting, in which the witness figured the assessments and submitted them to the Board, and if they were then approved, that the Board then notified the Railway Company; that this first meeting was a private meeting, and that then the public meetings were held upon the notices given. That the witness could not tell why, in the first

formula, the I. & G. N. physicals were assessed at over $30,000,000.00, and then in the second formula finally changed to over $28,000,000.00. That he did not remember, that may be the Board may have done it; that he did not remember whether it was done by the Board as a whole, or by himself, but that all of these formulas introduced into evidence were just private memoranda.

487 The witness was asked why, when it was shown at the public hearing, that the Railroad had not made an income on the Railroad Commission valuation, much less on the valuation of the Tax Board of over $39,000,000.00, and why, when it was also shown at this meeting that the Road had been foreclosed, this foreclosed stock of $4,822,000.00 was held by the State Tax Board to be worth $12,934,000.00, and the witness was asked to state on what evidence the State Tax Board so found. The witness stated: "We followed the figures, sir.

Q. You had no reason except these figures?

A. And the condition of the road; yes, sir.

Q. The condition of the road? Tell me about that.

A. As a going concern, any railway company, most railway companies, as a going concern, has a certain value." The witness further stated that he would not like to say that a going concern, which was bankrupt, is worth its capital value, that he imagined that it depended enirely on conditions. The witness was asked whether or not he had any reason, or any factor which made him think the Road was worth over $39,000,000.00 and the stock worth a premium of over eight million dollars, other than his formula and the fact that the Road was a going concern, and he answered: "I would not like to say, that was all." Further, that the Board tried to get all the information it could about the Railway. The witness was asked to state what that information was, and he stated that as far as he was personally concerned, he went to two persons especially, about the I. & G. N. Ry. Company. To two of the Ex-Tax Commissioners, and asked them what they knew about the Railways and the I. & G. N. particularly, and for other information which he could gather. The witness was asked to state what that information was, and stated "Reading, as far as I could, afterwards we took into consideration the evidence that was offered by the Railway Company at its final hearing." Then he stated that this evidence did not move the Board.

"Q. Then, as well as I can get at anything tangible, you were guided by this formula and the things expressed in this
488 formula, and the fact that the Railway was a going concern?
A. This and other matters."

The witness stated that he could not tell what relation existed between the gross income and the profits of a Railway Company, and that he did not know whether any such relation existed, but that he would take it that a Railway Company whose gross income amounted to a certain percentage of its capital stock would be more valuable; that there must be a gross income before there can be a net income. The witness said that he would not like to say whether or not he at-

tempted to determine what the net income of the I. & G. N. Ry. Co. was; that the Board did this as to some Railroads, but that he did not remember as to the I. & G. N., that he knew what proportion its net income figured out on the Railroad Commission tables. That the State Tax Board was unwilling to accept the Railroad Commission valuations. "We have as much right to figure our way as they have." That the Board paid no attention to the figures of the Railroad Commission. That it did pay attention to value based on net income in case of some Railroads, but in the case of the I. & G. N. Ry. did not, as far as he remembered. That the witness said he could not speak for the Board, why it was unwilling to accept the Railroad valuation, or as to himself individually, he would not say that he thought the Railroad Commission valuations were untrue, but that he figured out the values of the I. & G. N. himself.

"Q. You figured them out yourself, as appears by this formula?

A. By one of them. I think I took your figures for it, Judge, I am not positive but I think, in your case, I took your figures." The witness explained that he meant he thought he had taken the figures given by the I. & G. N. Railway for its physical values, but that he was not sure of this. That the physical values were taken by the Board for the I. & G. N. at $28,372,810; that the Road had made affidavit on one return to the Board, that it was $26,000,000.00 and the rolling stock $2,000,000.00. The witness was then asked why, that taking the $28,000,000.00 odd as the value of the physicals, he did not deduct that from $32,000,000.00 odd the Railroad

489 Commission valuation, and answered that he paid no attention to the Railroad Commission valuation, as far as the I. & G. N. was concerned, but that he took the I. & G. N. figures of its physical valuation. That he would not like to say that he reached the total true value of the I. & G. N. Ry. by his final formula without investigating any income; that he did not remember. That he could not recall the figures brought before him at the public hearing on June 18th, 1915. That he did not consider that the Board considered the figures after the hearing. They were of one mind, but he would have to speak for himself, not for the Board. As to the relation between the value of the I. & G. N. stock and the gross income, the witness said that he considered it to exist just as appeared in the formula. The Board had heard the evidence that this stock had never paid any dividend, except once, and then a part of it for one year, that the Board considered this evidence as true. The witness was asked, while accepting this evidence as true, the Board adhered to their preliminary estimate, and answered, "just like I explained before."

"Q. On this formula?

A. On that formula, yes, sir.

Q. You did it on the formula and stuck to the formula.

A. Yes, sir."

The witness further stated that, taking the T. & P. capitalization in round numbers at $95,000,000.00, that if its stocks and bonds were worth 12½¢ on the dollar and the proportion between this gross income and its capitalization was 12½, then that on the $30,000,-

000.00 capitalization of the I. & G. N. and the gross income of $10,000,000.00 that the I. & G. N. stock would be worth something more, but that he assumed that because he had observed an approximate coincidence of the market quotation to the ratio, which expressed the relation between capitalization and gross income to the T. & P. there would be such an approximation on some of the other Railroads, and that particularly that assumption was made simply because of the approximate coincidence on the T. & P. Ry. That the proportion between stock and mortgage debt on the I. & G. N.
490 was approximately 1/5, and the proportion between mortgage debt and stock on the T. & P. was approximately 38/56th, or approximately ⅔, and that in round numbers on the I. & G. N. there is $5.00 in bonds ahead of every dollar in stock, and on the T. & P. $1.33 in bonds ahead of every dollar in stock. The witness was asked to state what documents he had, or what were considered, and what data was considered, outside of the formula and outside of the fact that the I. & G. N. was a going concern, and he answered that they had the I. & G. N. reports for 1906, and different letters, the Railway Commission reports and different tax reports and the different data that the former Tax Commissioner had left in his office. That he had just general knowledge, and general knowledge of the Railway Company as a whole. That they took into consideration the fact that the Railway was in the hands of Receivers, and reduced the intangible assessment from 1914 $3,500,000.00. That he had acquired his information from any source that he could. Asked to state specifically the different sources with reference to the I. & G. N. he stated that the Board had investigated generally, not only the I. & G. N. but the other Railroads, and that there was no discrimination on the part of the Board as to the I. & G. N. Railway.

At this point the defendants made a motion to exclude all evidence with reference to the formula and to the way in which the valuations were made by the State Tax Board, and to exclude any other evidence along that line, which motion was overruled and the defendants excepted, and the cross-examination of Mr. Bagby by the plaintiffs proceeded and he stated:

That he, as a member of the Board, tried to find out every item as to the Railway Company. That they had no idea what the stock of the I. & G. N. would sell for, but that as far as intangible assets were concerned, that he meant to find that it had the value which the Board gave it to-wit: of over $13,000,000.00, but that this did not mean the market value; that the Railway Company said it had no market value, and that in finding that $4,822,000.00 par
491 stock of the Railway was worth $12,934,533.00 he did not mean that that was its market value, but that so far as intangible assets purpose was involved that it was worth $12,934,533, but that he did not mean that the stock might be reasonably bought at that price by a sound business man as a wise investment. But the witness immediately corrected himself and said "I beg your pardon, wait a minute. So far as the taxable value, yes, sir," and that as a railway concern he thought that the I. & G. N. Railway, if put into the hands of a business concern, would be a paying Railway, but that

he did not say that a wise business man could have bought the property at that value, but that it was his private opinion that the property had not been in good hands, that he understood that it was what one might call an exploited railroad, exploited by the Gould System and Busch. The witness was asked who told him that it was an exploited railroad, exploited by the Gould System and Busch, and he answered, the two Ex-Tax Commissioners of the State of Texas. He was asked: "And you took their word without investigation?

A. No, sir.

Q. What investigation did you make?

A. If you will read the newspapers——

Q. You took the newspapers' statement?

(A) Yes, sir, to a certain extent."

The witness further said that he did not ask the Railroad Commission of Texas to give him the facts as to whether the Road had been exploited or not; that he did not like to say that he understood it had been robbed by Wall Street, but that the Tax Commissioners of the different Railway Companies of Texas, who make their reports, will tell one that under their idea in the next five to seven years the I. & G. N. Ry. will be out of the hands of the Receiver, and that this was the witnesses' opinion. But that he did not base his idea that a wise business man would pay a premium for this stock of over $8,000,000.00 upon what he had seen in the newspapers, that the Road had been exploited by Gould and Busch, nor did he say that in his opinion that a wise business man would pay such a premium. Asked whether or not he considered that
492 this stock, at the time it was assessed, was of the true value of $12,934,000.00 he said that he did so consider for intangible assets purposes, and as a business value, but that he did not exactly say that in his opinion a man could go out and buy it wisely at that price and make a good investment, but that as far as an investment was involved that in the next five or seven years the Railway would be out of the hands of the Receiver, but that the witness did not like to qualify as a railroad investment expert, but that from what he could understand the Railway people of Texas say that if the I. & G. N. was in the hands of people local directors, it would be a paying investment. As to naming what Railroad men of Texas told him that, he answered, he thought Mr. Werner and Mr. Holder the Auditor and the Tax Commissioner of the Plaintiffs herein, but could not remember anybody else, that it was just a general impression. That he would not say that Mr. Holder told him that, but he thought that he did, but that his best judgment was that the I. & G. N. Ry. was worth $39,000,000.00 plus, as far as he knew. There was exhibited to the witness the answer filed in the United States Court, and described above, and his affidavit was shown to him thereto, and he said that he signed the affidavit and made that affidavit. This answer was also separately signed by Mr. Bagby and by Mr. Terrell, the Comptroller and Mr. McKay, the Secretary of State, that is, signed by them individually and not by the lawyers for them. He said that he had casually read the answer, but that he had told Mr. Nickels, who drew the answer, the facts, and that

he knew what was in the answer, and that he would not swear to a thing without knowing what was in it if he could help it, and that this answer fairly shows, to a certain extent, the theories on which the value of the Railroad was assessed by the Board, and that to the best of his knowledge and belief everything in the answer was true.

The witness was requested to return to Sec. X of the answer. This Section is as follows:

"Defendants, therefore, allege that the true taxable values of the entire properties of the Complainants within the State far ex-
493 ceed the sum of $24,627,433.00, the amount of such values that will be subjected to taxation by the complemental action of the State Tax Board and the various county taxing officials, and that the value of said properties, subject to assessment for taxation by the State Tax Board, under the general and arbitrary designation of "value of intangible properties" far exceeds the sum of $10,743,223.00, the amount of the final valuation thereof by the State Tax Board."

The witness was asked whether or not what was stated in this Sec. X was true, according to his understanding, and he said that it would place him in a very embarrassing position, but that as far as the Board was able to understand $10,743,000.00 represented the intangible assets of the Railway. The witness first said that he did not regard the words in Sec. X "value of intangible properties" as an arbitrary designation. That he denied that statement to a certain extent. And further "That is an arbitrary designation; yes, sir; in as far as the I. & G. N. is concerned." That he did not think that the word "intangibles" in the statute was necessarily an arbitrary designation, and he did not think that the finding of intangibles was an arbitrary finding. The witness was asked to turn to Section V of the pleading in this answer summarized above, and was asked whether these words in Section V correctly stated his definition and understanding of the guidance of the statute, to-wit: "The purpose of this statute was to carry out the plain language of the Constitution, and to cause to be placed upon the tax rolls every element of property, by whatever name known, hitherto and otherwise escaping taxation by reason of non-assessment or insufficient assessment by county officers." That the witness answered that so far as he was personally concerned he tried to put on all the intangibles of the Railway Company that he could. The witness was asked this question, quoting from the pleading: Whether or not it was his purpose to tax "all property hitherto and otherwise escaping taxation by reason of the non-assessment or insufficient assessment by the county officials"? the pleading stating that this was the purpose of the statute, and he answered—"The last part of it, no, sir; I tried to place upon the Railway Company all taxes I thought was due by them, not on account of the insufficient assessment of the County officials," and he said that that was an incorrect
494 statement. There was then read to the witness from the pleading what next follows in quotation marks, and the wit-

ness was asked "Did you or not try to reach a result which 'result represents the additional value to be taxed, under the general and undefined term 'value of intangible property?' Did you try to do that?

A. Yes, sir; I tried to get all the intangible properties of the Railway Company."

The court asked the witness this question,—whether or not in making the assessment of the I. & G. N. Ry. the Board arrived at the true value of the entire property and deducted therefrom the amount assessed by the proper authorities aaginst the tangible property and took the balance as intangibles and assessed it as such. This question was objected to by the defendants, and over their objection and exception was insisted upon by the plaintiffs, and the witness answered that the Railroad made affidavit to the actual value of the Railroad in thee counties exclusive of rolling stock $26,000,000 and the rolling stock $2,346,000.00, and that that was the way "We arrive at the value of the Railway," that it was not done as stated in the court's question. The witness was asked whether or not he understood and applied this statute as set out in the pleadings, that is, the intangible tax statute wherein at the end of Section V, it was stated that it was intended to supplement the old statute, and to cause every element of property held by the Railroad Companies by whatever name, to be taxed as manifested from the statute itself as construed by the Supreme Court in M. K. & T. Ry. vs. Shannon, 100 Texas, 479.

"A. Yes, sir, just as it is stated there, as far as the intangible assets, yes, sir."

The witness was requested to begin at the head of Sec. VI and extending to Sec. VII and his attention was called to these words next placed in quotation—"that the purpose of the legislature was to secure the placing of all property upon the Tax Rolls" and "of all the elements of property not otherwise assessed." "The method of calculation, or formula, used by the State Tax Board in arriving at its valuations, is wholly immaterial, so long, at least, as
495 such final valuation does not result to place a total valuation upon the tax rolls unreasonably in excess of the true total value of all property subject to taxation." The witness was then asked—"You understood the law to mean, that, didn't you, and acted on that principle?

A. Yes, sir."

The witness said that he would say now what he had said in the Federal Court, that his conduct in making this assessment was based upon all of the documents before him, as well as the formula, but principally upon the formula, and that that was substantially correct, and that he furthermore would say, as he said in the Federal Court, that what he intended to do was to get the corrected true value and to make the intangibles a fair representation of the residue of the property, and that he did not regard the intangibles as anything more than arbitrary, and under the term "intangibles" including the residue of the property. The witness said that that was correct, to a certain extent, and that he had answered in the

Federal Court that it was correct, to a certain extent, and furthermore, that he now stated, as he stated in the Federal Court, that the finding of the value of the intangibles at $10,743,223.00 did not represent the intangibles strictly defined, but represented the tangibles taken arbitrarily, to a certain extent.

The witness was then asked to turn to Sec. VIII of the answer in the Federal Court, and whether or not he had not there stated that $49,993,100.00 represented the judgment of the Complainants and persons who invested in the property, as the minimum value of the property, and he answered that he so thought and still so thinks, but then that would qualify the statement that he thought that the I. & G. N. Ry. was worth that sum. The witness was asked whether or not, as a member of the Board, he considered the item of Interim Certificates, and said that he did not, and that as far as he was concerned, they were not considered, that he did not remember whether he had stated in the Federal Court that he understood or had the impression that the I. & G. N. Ry. had assets of a little over
496 $49,993,000.00, and would not say whether the stenographer in the Federal Court had got his answer down to that effect correctly; that by the pleading one would understand that the I. & G. N. Ry. had assets to the extent of over $49,000,000.00, and that as far as he understood now, but that these figures were correct at the time, but that he did not have this balance sheet before him in valuing the intangibles and that he had stated in the Federal Court that he knew nothing about the application of Judge Freeman for the valuation of the properties in 1911, and that that statement was correct, and that he did not consider the valuation of the Railroad Commission of the physicals of the I. & G. N. Ry., as far as he was concerned.

The witness was requested to take the formula appearing in this statement above, of the Galveston, Harrisburg & San Antonio Railway, and said that in the application of the formula the value of that Railway was found to be $76,861,000.00 odd, and that from this value was deducted a little over $20,000,000.00, that is, the Board deducted it, not the witness. That he did not approve of that deduction, but was not exactly overruled by the Board. That as to why the Board made that deduction of a little over $20,000,000 he would not be positive, but that hearing the argument for the Railway they made it. The witness's attention was called to the fact that it appeared in the formula that the capital stock of the G. H. & S. A. Ry. is over $27,000,000.00 odd and the lien indebtedness $36,000,000.00, and that the Board applied the formula and raised the capital stock $40,000,000.00 and then cut off $26,000,000.00, and was asked why he thought the capital stock of the G. H. & S. A. was less than $26,000,000.00 under the amount produced by the formula, while the I. & G. N. was found by the formula to be at a premium of $8,000,000.00, and the witness answered that this was the action of the Board, that he agreed to it, but does not say that he approved it, and to the inquiry why the valuation was made of the I. & G. N. stock at a premium of over $8,000,000.00 while the

G. H. & S. A. stock was valued at $20,000,000.00, when the
497 I. & G. N. stock was proportionately much heavier loaded with bonded indebtedness. When asked why this was done he answered that this was the action of the Board, that after hearing the evidence they thought the G. H. & S. A. was entitled to this deduction. The witness was asked why the G. H. & S. A. stock was put at $7,000,000.00 below par and the I. & G. N. stock subject to a greater proportion of liens was put at a premium of $8,000,000.00 above par, and the witness answered that this was the action of the Board, as well as he remembered, that he did not vote against this action, that there was no vote.

There was next taken up with the witness the formula and valuation of the H. & T. C. Railroad by the State Tax Board for 1915, and the witness was asked whether the Railroad Commission valuations were before him, and he answered that he did not remember. It was then started to the witness that the H. & T. C. had a mileage of 784 miles and a lien indebtedness of about $16,000.00 per mile, while the I. & G. N., by the Board's figures, had a lien indebtedness of $24,000.00 per mile, and the witness was asked why the H. & T. C. stock, subject to a much less indebtedness, was valued at a much less premium than the I. & G. N. stock, subject to a much greater indebtedness, and he answered:

"A. We worked it out on the same formula, the same as we did the I. & G. N.

Q. You worked it on the formula?

A. Yes, sir.

Q. And where the formula landed you, there you left it; isn't that correct?

A. Yes, sir."

The witness was next examined upon the Board's finding of intangibles for the Houston, East & West Texas Railway, and stated that his figures showed a total capitalization of approximately $5,000,000.00 and that applying his formula, the Board found that Railroad is worth $7,000,000.00, which it reduced to $6,000,000.00 in contradiction to the formula, valuing the stock at $4,270,000.00.

The witness was asked why the Board did not stick to the formula as to that Road, and said that this was the action of the Board, after hearing the evidence and the argument, and that it was subject to a very much less lien indebtedness than the stock of the I. & G. N.

"Q. You wanted to stay by the formula, did you?

498 A. To a great extent, yes, sir."

The witness's attention was next directed to the Board's valuation of the T. & N. O. Railroad for 1915, and said that that was a pretty big Railroad, and was asked why its stock with so much less mortgage debt ahead of it than in the case of the I. & G. N. per mile was valued at a less premium than the I. & G. N., and whether or not that was not done that way, because the formula came out that way.

"A. I imagine so, if it works out according to the formula.

Q. Yes, sir; you did not change the formula; you just took the results?
A. Yes, sir."

Over the objections and exceptions of the defendant the witness stated that the Board capitalized the net income of the El Paso & Northeastern Railroad at 7% and took the result as representing the true value of the Road, and did not use the formula. Asked why he was unwilling to capitalize the I. & G. N. net income at 7%, the witness said that the Board tried to place every Railway on the same basis, and that as to some the formula would not work out, and was not followed, and that he thought that there were two Railroads in which the total value was reached by capitalizing the net income at 7%.

The formula used by the Board in the case of the Ft. Worth & Denver City Railway in connection with finding the valuation for 1915 was next submitted to the witness and he stated that that Road was a good Railway Company; that its capital stock was $9,000,000.00 plus, and its lien obligations $8,000,000.00 plus. The witness was asked why that capital stock was put at a premium of over $2,000,000.00 with much less lien indebtedness ahead of it than the I. & G. N. had, and the I. & G. N. stock had a premium of $8,000,000.00.

"A. I think that is one of the railways, sir, that we worked out according to the formula.
"Q. The way that was, it was just like the formula brought it out, the formula was the thing that determined that?
A. Not entirely; no, sir."

The witness was asked as to the Ft. Worth & Denver City Ry. how it was that the less loaded stock of that Road was put at a
499 less premium than the stock of the I. & G. N. Ry.

"A. We just applied the formula, just like we did to the I. & G. N., and took everything into consideration."

That from the reports he considered that the I. & G. N. stock was more heavily loaded with liens than the F. W. & D. C. stock, but that it was the action of the Board in which he concurred in putting the I. & G. N. stock at a greater premium.

The witness's attention was directed to the formula and valuation by the Board of the Ft. Worth & Rio Grande Railway for 1915, and said that its ratio between average gross income and capitalization was about the same as the T. & P. and it was called to his attention that the Board had depreciated the T. P. stock on that formula 7/8 and the Ft. W. & R. G. stock less than 5%, and was asked whether or not he knew that his formula was leading him utterly astray.

"A. No, sir.
Q. You don't say it still?
A. No, sir."

That if he had had the twin of the T. & P. figures, the ratio would have been exactly the same, and then he would have divided this ratio by the T. & P. ratio he would have got one, that is the figure 1, because the same goes into the same once, and that then multiplying the stock by 1 one would get the par of its stock, and that he still thought that his formula was correct, but that he did not mean to agree with the conclusions of his questioner.

Coming now to the Gulf, Colorado & Santa Fe Railway, the witness said that he thought that the Board had reduced the results of the formula and he thought that that was one Road assessed arbitrarily by the Board, that its total capitalization was found to be $53,000,000.00; and asked why the stock of the Santa Fe was put at a less premium than the premium at which the stock of the I. & G. N. was put, the I. & G. N. stock being more heavily loaded with bonds?

"A. That goes back to the same question; we just capitalized the gross receipts."

That from the reports he had to go by, and information he got, he understood that the Santa Fe was a far better equipped Road than the I. & G. N., not in the hands of Receivers, and a better money making proposition.

"Q. Yet you doubled its stock, approximately, a little more than doubled it, while you multiplied the I. & G. N. stock by a much greater multiplier. Why did you do that?

A. Just on account of what the Board did.

Q. Just on account of the formula?

A. Yes, sir, but the Gulf, Colorado & Santa Fe, I want to explain, was reduced by the Board, not reduced by me."

Coming to the M. K. & T. Ry. and its valuation by the Tax Board, the witness said that applying his formula to that Road, it came out a total valuation, he supposed, of $57,000,000.00 odd, and that a physical valuation was deducted of $37,000,000.00, but that the witness did not recollect whether or not he knew that the Railroad Commission- physical valuation was $27,000,000.00 in odd numbers, but imagined that it did; and asked why a deduction for physicals was given of $37,000,000.00, $10,000,000.00 over the Railroad Commission's valuation, while the I. & G. N. was given a deduction of $4,000,000.00 less than the Railroad Commission- valuation, as deductions for physicals, the witness said that after the meeting the Board fixed it.

Coming next to the St. Louis & San Francisco Railway Company of Texas, the witness said that the Board applied the formula, and that they found by the formula that it had a total value of $5,649,000.00and that if they had deducted the Railroad Commission- valuation of $2,000,000.00 it would have left intangibles of $3,000,000.00 and over. So, that the Board abandoned the formula entirely and put down the true value at $2,000,000.00 and the physical value at $2,000,000.00 approximately, and found that there were no intangibles; that this was just the finding of the Board, and its best judgment. That in his opinion a Railroad need not necessarily have any

intangible value at all "if it has got any business value it has got intangible value."

Next the witness' attention was called to the St. Louis Southwestern Railway Company of Texas, known as the Cotton Belt, and its valuation as made by the Board for 1915. He stated that there were many things taken into consideration by the Board that had escaped his memory. That he imagined, though he could not state, that the Cotton Belt had made affidavit in its report justifying the
501 Board in taking a portion of the capital stock at par, and a portion of the mortgage debt at less than par. Asked how it was possible for the stock to be worth anything if the bonds were depreciated, they having a lien ahead of the stock, the witness said: "I would not like to say so, I don't think that it would." The witness was asked why the capital stock of the Cotton Belt was put at par by the Board, and the stock of the I. & G. N. at a premium of over $8,000,000.00, and answered that this was the action of the Board, and that he would not like to answer that question right now for himself, that many things were taken into consideration, but that the Board tried to get every element of value and everything, and that he did not exactly recall all of these elements at the present time.

Coming to the Texas, Arkansas & Louisiana Railway Company, a small enterprise, the witness said that its capital stock had been found by the Board, applying the formula, to be at a premium of over four times its par, but that the Board paid no attention, as far as the witness knew (except perhaps indirectly) to the Railroad Commission's valuation for a deduction; that many of the Railroads complained of the Railroad Commission valuations as too low, but that as to why the Railroad Commission valuation was raised so as to make the tangibles equal the whole value of this Road, the witness could not answer, saying *the* there were circumstances which he did not remember.

As to the Texas Midland Railroad, and its valuation by the State Tax Board for 1915, the witness said that it had almost the identical ratio of the I. & G. N. and almost the identical multiplier of the stock of the I. & G. N., but that the Railroad Commission valuation of this property was given as a deduction only to the extent of about one-half, and intangibles found, as appears in the formula, but that the Board had further reduced these intangibles.

As to the Texas & Pacific Railroad, and its valuation by the State Tax Board for 1915, the witness was asked why its capital stock was discounted by the Board $34,000,000.00, and the capital stock
502 of the I. & G. N. put at a premium of over $8,000,000.00, when the mortgage indebtedness of the Texas & Pacific ahead of stock was proportionately less than the mortgage indebtedness of the I. & G. N. ahead of stock.

"A. We worked that on the formula.

"Q. You just took what the formula brought it out and let it stand? That is right?

"A. On the T. & P., yes, sir.

"Q. Just like you did on the I. & G. N.?

"A. Yes, sir.

"Mr. Myer for the defendants: 'You mean by that, that you——'

"Mr. Dabney, for the plaintiffs: 'I object to the gentleman breaking in; he has answered the question.

"A. I brought everything I could, just the same way.

"Mr. Myer for defendants: 'You haven't said that. You said you raised it entirely on the formula.'"

As to the Trinity & Brazos Valley Railroad, the Board found that it had no intangibles for 1915, and that he assented to that finding, as he did to a similar finding for various other Railroads.

On Redirect examination by the defendants, Mr. Bagby testified as follows:

That each of the Railroads filed their reports in forms similar to those of the I. & G. N. and the T. & P. and had done so for five or six years back. That the Board considered these reports and the information in them, at least that he, the witness did, and that he considered the I. & G. N. reports and former valuations made by the Board of all Railroads, and got information from any source where he could find it, and considered all the evidence and argument offered by counsel for the railroads, and their witnesses, and that the final valuation in each instance reflects the witness's honest judgment as to what the evidence showed the values to be, and that he had no ground to suppose that it did not reflect the honest judgment of the other members of the Board. That after hearing the evidence and those statements, the Board decided, in their best judgment that some of them should be reduced, and that the witness concurred in such decisions, because of the effect of the evi-
503 dence on his mind. That he understood the law required him to consider the evidence, that he did so to the best of his knowledge and ability. That the Board applied the formula, and if it resulted in what they thought, in their best judgment, was correct, they let it stand; that if the Board decided, after the evidence was in, that the formula did not reflect what one would call the best judgment of the Board, then the Board changed it, and that the witness understood that the law imposes this duty upon him, and that when he was first appointed Tax Commissioner the Railroad Tax men complained bitterly about the formula, the Tax Commissioners not being able to apply them and would not apply them, and that he had been informed by Mr. Dashiell, one of the former Tax Commissioners, that there was no law to compel the Tax Commissioner to give his reasons for his findings, but that when he, the witness, went into the office, he made up his mind to try to tell the Railroads and to show them how their intangibles were arrived at, and that that was what he called the formula and that that was the only thing about the formula. That Mr. Dashiel had said he arrived at it (as well as the witness recollected) from a judicial ascertainment, from which there was no appeal. That after hearing the evidence and argument the Board, to the best of their judgment, placed the physical and real values, and what they could arrive at is the intangible value, if there was any.

Recross by defendants:

That the witness would say that in an ordinary conversation he had told Mr. Holder, the I. & G. N. Tax Commissioner, that the formula showed the basis of the I. & G. N. action for valuing that Road.

504 (29) Judge W. H. WARD, County Judge, was recalled by the defendants and testified:

That he did not know when the Full Rendition Law went into effect, but that he went into office in November, 1912. That his recollection was that in 1913 the representatives of the H. & T. C. and I. & G. N. Railways came before the Board of Equalization with regard to their physical properties and used the argument that they would have to pay full value on the intangibles as a reason why the values of the physicals should not be raised. That his recollection off-hand was that that argument was given consideration, and the H. & T. C. was raised slightly, but that he did not remember as to the I. & G. N. and that this argument was used by the I. & G. N. That Mr. Hiser would know, that the I. & G. N. may have been raised slightly, but that the witness did not know, but that the Assessor, Mr. Miller, contended that the H. & T. C. was very much underassessed on physical properties. The witness said that he did not think that this factor had been considered every time, because the question of these railroads did not arise every time, or on the last two assessments.

Cross-examination by plaintiffs:

That on the occasion referred to in 1913, according to the law, and the statements of the Company, and on the basis which he testified to, he thought that the I. & G. N. physicals were valued, as nearly to their full values as the Board could approximate on the basis which he had stated in his previous testimony, that the Board had been assessing everybody else, trying to squeeze out the water and get it down to where it ought to be, trying to assess on a parity with other railroad physicals and other property owners. That Mr. Miller, the Assessor's contention at that time was that some of the Railroads, one or two, were too low, and that the Board was trying to get them on a basis with the others, and the property owners of the county generally and with the banks, that that was the Board's intention. That the Railroads, the I. & G. N. and H. & T. C. had used the contention that they were paying full value on
505 their intangibles, and that the State Tax Board had fixed them too high, and that this consideration should apply to the Board of Equalization in leaving the assessments, as the Railroads had placed them, and that it was his recollection that this was done with the exception, possibly, of the H. & T. C. and the I. & G. N., and that in fixing the values on tangibles, the representatives of the Railroads, as to the action of the State Tax Board on intangibles,

were considered, but that independently of that he did not remember how the valuation of the physicals of the I. & G. N. were fixed.

There was next handed the witness the inventory and assessment of the South Texas Commercial National Bank finally passed for the year 1915, and which shows that 70% of the book values, including real estate, was the assessment made.

The witness said that he thought the valuations of the Railroads would be in line with the banks. That assuming, if it be a fact that the assessment of the bank at that time was 50% of the market value, including in the assessment real estate, that he did not know whether or not the railroads' physicals were brought to about the same basis. That he would have to look at the railroad stocks and what they sold for. That the processes pursued as to the South Texas Commercial National Bank were the same as that pursued, as far as could be, as to other banks and trust companies.

Redirect examination by the defendants:

The witness said that it was his recollection that the Board took the values of the physicals of the Railroads as rendered by them and did not raise them, except in possibly one or two instances, and that the Board could presume that the railroads would naturally make their renditions in line with others, of real property in the county, and that the argument had been used in order to have these renditions stand, that the State Tax Board had been valuing their intangibles as the railroads claimed, at too *greater* rate.

506 (30) H. G. Lidstone recalled by the defendants, was examined by them and testified:

He stated that he had before him a detailed map used for the purpose of arriving at property values by acreage, not at present a part of the records of the Assessor's office in which the witness worked as a Deputy, but intended to be a part of such records at some time, and in use for the equalization of all property. That this detail map shows the Columbia Tap and part of the I. & G. N. Railway Company from Leland Street, or a little North of Leland down to the old city limits, and that on this map are indicated the values of abutting property in ink, and some of it is marked so much an acre and others it is indicated by lots and blocks. Where the property is in acreage, not subdivided, acreage is used when it is not subdivided, the unit is used which is one foot front by 100 feet back, and that where the ink figures appear on the map not followed by the words "per acre" it indicates the value per front foot in that particular block. For instance, in block 3 there is a figure 8 which would indicate the value of $400.00 a lot of 50 by 100 feet.

The defendants here offered in evidence the lot map, and over the objection and exceptions of the plaintiffs it was introduced in evidence. This map is marked "Exhibit 24" in the roll of maps made a part hereof.

(31) R. D. Parker was called by the defendants and testified as follows on their examinations.

That he is a Civil Engineer connected with the Railroad Commission since June 1st, 1909, his duties being mainly to appraise railway property under the Stock and Bond Law, in which he has been actively engaged since the date stated.

That he had been connected with the property of the I. & G. N. Ry. and especially with that portion in Harris County since that time, and that he was acquainted with some parts of it before that, being engaged in the Construction Department on the Ft. Worth Division. That since he has been connected with the Commission his work has been confined to appraisements made to be pre-
507 sented to the Commission, but prior to that consisted of location of construction and maintenance of railway properties, graduating in 1908, and about a year thereafter starting in railroad work, that he graduated from the State University Engineering Department, and that before he came to the service of the Commission he was continually engaged for making estimates for new work for the Management of the Railroad and investigating cost of materials, to inform them what the new work would cost, and also cost of construction.

That he has recently made an inspection of the I. & G. N. properties in this county, but not of all of them, but was mainly confined to the main line of the Gulf Division commencing on the Harris and Montgomery line mile post 126, and extending into Houston, the Galveston, Houston & Henderson connection south of the I. & G. N. depot, being about 25 miles, and that he made rather a cursory examination of the Houston Oak Lawn & Magnolia Park property, which he had been over two or three times prior to that date but did not examine the Columbia Tap. That he had been over all of these properties before, he thinks three time, having been over them with the view of inspection for valuation, that is one of the inspections was made for that purpose in 1911, when the Commission made a so-called revaluation of the property and when it was desired to make an appraisement of the Houston Oaklawn & Magnolia Park properties built or acquired since 1904. In 1904 Mr. Thompson, the former Engineer of the Commission, having made an appraisement of that property for the purpose of issuing bonds, that is, of the Oak Lawn & Magnolia Park. Here such report of Mr. Thompson was introduced and was in substance as follows:

It stated that an application had been made by the I. & G. N. R. R. in January, 1904, to the Commission for authority to issue bonds to the amount of $449,000.00 as representing a part of the value of the former Houston Oak Lawn & Magnolia Park railway purchased by the I. & G. N. R. R. under Special Act approved Feb-
ruary 21st, 1903, Chap. 5 page 12 of the Special Laws of the
508 28th Legislature. It recited that the application was authorized by the stockholders and directors; that the Ho. & M. P. Ry. begins in Houston on the East line of Fannin Street, thence Easterly along Commerce Street to the City limits, then Easterly down Buffalo Bayou near the junction with Brays Bayou and from near the junction to an extension Northerly connecting with the main line of the G. H. & S. A. and forming a belt line in Magnolia

Park. The title of the I. & G. N. to the Magnolia Park Railway is then recited, including a deed of Dec. 28th, 1903, from the Houston & M. P. Railway to the I. & G. N. R. R. for all of the property and franchises of the former Company, on a consideration of $600,000. in the bonds of the I. & G. N. R. R. That the total track of all kinds including 2½ miles of spur tracks is 10.16. That the I. & G. N. places the value of property and franchises at $623,137.53, putting the depot grounds in Houston Blocks 6 and 12 and 3/12 of block 11 and lot 10, block 10, at $254,800.00; franchises including damages to abutting property $160,000.00 terminal grounds on Buffalo Bayou 60.42 at $60,420.00 tracks, structures, right of way property, etc. $147,912.53. Mr. Thompson reported that on January 6, 1904 he had inspected the property and reached a total valuation therefor of $515,475.29 as follows:

"1. Depot grounds, Houston, Blocks 6 & 12, 3/12 of Block 11, and lot 10 of Block 10.....	$200,000.00
2. Value of franchises on streets of Houston.....	100,000.00
3. Terminal grounds on Buffalo Bayou.....	75,420.00
4. Roadbed, track, structures and right of way...	137,745.29
5. Rolling stock	2,310.00
	$515,475.29"

Of this estimate he makes a detail- report, he states that item 1, the depot grounds, are of great value, situated within one block of the Court House and one block of the Postoffice and immediately adjacent to the wholesale and chief business portion of the city, and more accessible and convenient to the business houses than the grounds of any other Railroad Company in the City. That the I. & G. N. R. R. proposes to construct thereon a commodious freight depot and that block 6 fronts for entire length on Buffalo Bayou; that the purchase price for these depot grounds as shown by the deeds was $192,500.00, the greater part purchased in 1902,
509 with the remainder of block 11, that is 9/12 of the same was bought in the name of the I. & G. N. and is not included in the above estimate, but that the entire property cost, as he was advised, $275,000.00, that the franchises of the H. & M. P. Ry. on Commerce Street from the East line of Fannin Street to the city limits, about 2 miles, is very valuable, enabling the Company to reach the depot grounds above mentioned and giving access to numerous industries along the Bayou, etc. That the estimate of its value is difficult, and that it is of much greater value to the I. & G. N. R. R. than to the Ho. & M. P., but taking its value at a fair percentage of the value of abutting property it would be very great, as the railroad occupies the franchises in lieu of the purchase of butting property, and that he, Thompson, had placed the value of $100,000.00 on this franchise which he considers fair and reasonable for the purpose of the railroad as now used, or as proposed to be used in the near future, but that there is a probability of dam-

ages being recovered from the Railroad by abutting property owners for more than he has estimated the value of the franchises. That the terminal property on Buffalo Bayou in Magnolia Park near Harrisburg aggregates 100.42 acres, of which he is advised 25 acres had been sold, leaving 75.42 acres owned by the Railroad, which he values at $1,000.00 per acre, the same as valued by the Company. That this property fronts on the bayou from Brays Bayou up about 1¼ miles and lies near the head of the Government surveys for deep water, and that the Railroad proposes to lease portions of it for industries. That the roadbed, track and structures have been valued in accordance with the standards before applying to railroads, and approved by the Commission, and that their present physical condition is not very good, the track being laid with 52 pound relay steel in fair condition. That the Ho. & M. P. property is essentially a terminal property and that the I. & G. N. proposes to use it for that purpose, and that it will give that Railroad an entrance into the most valuable business and manufacturing portions of the City of Houston, greatly increasing its present somewhat limited
510 facilities for competing for traffic, and that as an asset of the I. & G. N. R. R. System it will be of great importance, and that he considers his valuation as very reasonable and conservative.

At this point the Plaintiffs objected and excepted to Mr. Parker's testimony, and over their exceptions and objections, he testified as follows:

That he had made a statement wherein he showed the valuation made by Mr. Thompson in 1904 and added to that the value of the properties constructed or acquired since that date, confining his additional calculation to physical structures, but leaving Mr. Thompson's valuation of real estate and of franchises unchanged.

The Gulf Division was valued in 1894 or 1895, and the Columbia Tap in 1894. Therefore, the totals made by the witness of real estate values reflect values fixed back at that time, except that of the real estate of the Ft. Worth Division valued in 1894, and partially since then, and the Magnolia Park and Oaklawn Division valued since then, as has been explained above. The Ft. Worth Division was valued in the sections commencing about 1902 and completed in 1903, and that portion of it in Harris county lies between Spring on the Gulf Division and the Harris and Montgomery line being approximately 13 miles, the values of real estate on this portion of the Ft. Worth Division were unchanged by the witness and left as they were in 1902 and 1903. That the Commission revalued the I. & G. N. properties in 1911, and subsequent dates, there was an item of real estate omitted from the original valuation which was taken up, witness thought, in 1912, and valued and added at that time. It was the acreage outside of a 100-foot strip of the road that was valued in 1912, and this is reflected in the figures. The witness stated that the figures he had made for the values in Harris County were intended to reflect the cost of the reproduction at the present time, except as to the cost of acquisition of the real estate, as to which he had

explained above, and which was included in the figures now to be given, but at the valuation placed thereon by the Railroad
511 Commission. The remaining values—that is, the cost of reproduction, were the construction cost of the properties in Harris County at the present time as estimated by the witness. This document showed as follows: Grand total in Harris County $2,878,213.79 composed of the following items:

Ft. Worth Division in Harris County	$364,548.19
Gulf Division in Harris County, main line	1,609,793.92
Magnolia Park Line in Harris County	743,181.62
Columbia Tap, or Branch, in Harris County	160,690.06
	$2,878,213.79

Of the total the witness estimated that the value of the right of way and station grounds and real estate aggregated, from the Commission values, was $1,110,694.47 which figures included 5% for legal and engineering expense, 5% for interest during construction, and 6% for so-called franchise value, or overhead expenses, and that deducting this real estate valuation from the total of $2,878,213.79 there would leave the value of the roadway and depot and other structures as estimated being its reconstruction cost today at $1,767,519.32, and also the witness stated that the Railroad Commission's established methods of appraisement had been used in compiling these statements, and that these figures were arrived at from the original records of the Commission resurvey notes made by the Engineers of the I. & G. N. Ry. office records of the I. & G. N. Ry. and notes taken on inspection of the property. The statement of the witness shows that his estimate covered the Ft. Worth Division from Spring to the Montgomery-Harris County line, the Gulf Division main line from Montgomery-Harris County Line to connection in Houston with the Galveston, Houston & Henderson R. R., the Magnolia Park Line, old Houston Oak Lawn & Magnolia Park Ry. from crossing of Main Street and Commerce St. to end of dock track at Brays Bayou near Harrisburg 6.43 miles, and the Columbia Tap or Branch from connection with main line of the Gulf Division in Houston to the county line in Harris and Ft. Bend Counties 12.512 miles.

It appeared from the figures of the witness that he had made up four sheets, one for each of the above subdivisions, making different estimates and then aggregating them to right of way and
512 station grounds and the various different elements of construction, taking the original valuations without change of the right of way and station grounds and other unimproved real estate, and then estimating, in addition, cost of construction of the structures and roadway at the time of the trial.

On cross-examination by plaintiffs the witness stated that as to the Magnolia Park Division he took Mr. Thompson's figures made in 1914 and made no changes in them, except that he added in betterments, other than purchases for real estate. That as to the balance of his estimates, he went and valued the property at what would be its reproduction cost to-day. That he had the Engineer's figures in

1895 relating to the Gulf Division and all of the original figures of the Commission made for the valuation in 1895, and that the effort was to bring them up to date. That he had not raised the previous values of real estate, but did raise the other figures to the present reproduction cost of the Railway—that is, he raised the production figures for building and constructing the railways. The witness said that he would have to make a computation to determine how much the reproduction cost he had estimated stood above the Railroad Commission valuations. It was agreed that these figures should be made by Mr. Parker and introduced in evidence as is done below. The witness said that the Railroad Commission had already valued, in its various valuations, everything he had on these sheets, and that his additions and changes were for the construction cost exclusively, that construction cost has increased very much since in 1895 in some instances, but that there have been some economies through improvement of mechanical apparatus and the use of better standards. That in his estimates he had simply taken the Railroad Commission valuations of real estate, excluding any change for increase or decrease of the value thereof, and then had made decrease for the reproduction construction cost of the railroad properties outside of the acquisitions of unimproved real estate in Harris County; that he did not think that there would have been any material
513 difference in this regard between 1914 and 1915. That his understanding was that the valuations made by the Railroad Commission of the Trinity & Brazos Valley Railroad was on the same reproduction cost, that the real estate had a market value at the time the Road was built. In other words, that might be its cost, or that it might be in excess of the cost. It probably was in the case of the Trinity & Brazos Valley, which had a construction company and they used there a wheel within a wheel, but that the Railroad Commission had reduced somewhat the estimates of the T. & B. V. and the construction contract, and that the method of the Commission has been, since its organization, to value by the cost of the reproduction of the property at the time it is valued, and that in the estimates he had made for Harris County he had excluded all rolling stock. That the Railroad Commission, in its valuation, carried the reproduction cost, at the time the valuations were made, forward through the years, putting on additions and betterments from time to time. That the Trinity & Brazos Valley largely goes through competitive territory, and is, as the witness understands, in the hands of a Receiver, and that witness's recollection is that it is valued at vastly more per mile than the I. & G. N. and that portion of the I. & G. N. which was valued in 1895, but that he did not carry the figures in his mind. That dealing with market values and road built into competitive territory, and under various conceivable conditions, might, with the lapse of time, turn out on the basis of income, to be worth far below the reproduction cost valuation made by the Railroad Commission and that if he, as a practicing engineer, were advising a client on the purchase of a railroad property, he would look at the cost of reproduction, Railroad Commission valuations and all data going to show what the road cost, and what it would cost to reproduce it, and tha

also it would be a business way to go at it, to look at the income and to advise his client, before he valued the property for purchasing purposes, to look into the goodness or fairness of location, competitive conditions, money making facilities, and all of the con-
514 ditions under and by which a good income would probably be determined. That this would be the business way of going at it, but not necessarily an engineering proposition, but that a consulting engineer ought to be an economist, as well as a mathematician.

The witness further stated that if he pursued the same method which he had used with reference to the properties in Harris County, of estimating the reproduction construction cost of the I. & G. N. Ry. all over the line, excluding the cost of acquiring real estate and rolling stock, and throughout the whole of the 37 counties, it penetrates, that the Railroad Commission valuation would be increased he would not say enormously, but he could not say how much. That he was inclined to think that increased cost of labor and material in construction would exceed the economies resulting from the development of better mechanical apparatus, but whether it would be an enormous increase he would not say, and that taking the whole line, there would doubtless be a large increase over the Railroad Commission valuation if the reproduction cost of construction were figured, but that there was no use in hazarding a guess at it.

That in some cases which he had had under consideration there was evidence that the cost of labor and material had not gone up for some things, as of engines and rolling stock and material, which railroad construction in the West had to be conveyed great distances, but that this was founded upon reading or what he had heard.

Redirect examination by defendants:

The witness said that he had data showing the change in the weight of rails on the I. & G. N. from time to time, and that he took into consideration and allowed for additional cost of new rails and other elements entering into the construction of railroads. That the Gulf Division was originally laid with 75 pound rails, now replaced with 85, and that the 56 pound rails had been replaced by 80 pounds.

(32) The defendants introduced in evidence maps show-
515 ing the right of way in the county and in the city, all of which appear in the roll of maps made a part hereof, as follows: Exhibits "2", "3", "4" and "5" cover the Ft. Worth Division between Spring and Montgomery County line in Harris County. Exhibits "6", "7", "8", "9", "10", "11", "12" and "13" cover the Gulf Division main line in Harris County. "Exhibit 14" covered Hufsmith Station on the Ft. Worth Division in Harris County. "Exhibit 15" covered the Columbia Tap. The remaining Exhibits have already been described in previous testimony.

(33) In connection with Mr. Parker's testimony, and the cross-examination of Mr. Parker by the plaintiffs, plaintiffs introduced by agreement, statement made by Mr. Parker as follows :

"International and Great Northern Railway Values in Harris County.

Division of line.	Railroad Commission of Texas valuations as originally made.	Statement of value, cost of reproduction new, at Jany. 1, 1915.	Increase.
Fort Worth Div. ('11)	$271,087.16	$312,648.55	$41,561.39
Gulf Divn. (1895)	793,451.70	1,380,612.29	422,429.39
" (omitted acreage)	164,731.20	.....	.....
H. O. L. & M. P. (1904)	468,613.88	637,377.03	168,763.15
Columbia Br. (1895)	105,455.24	137,813.10	32,357.86
Total	$1,803,339.18	$2,468,450.97	$665,111.79
* x 10%	180,333.91	246,845.09	66,511.18
	$1,983,673.09	$2,715,296.06	$731,622.97
# – 6%	26,149.10	162,917.76	136,768.66
	$2,009,822.19	$2,878,213.82	$868,391.63

*Includes 5% for Legal and Engineering expenses, and 5% for interest during construction.

#Six per cent Franchise value allowed by Commission; in original valuations this was only on "omitted acreage" and on Fort Worth Div.

(34) With reference to the order entered in the Federal Court, set out hereinabove, it was admitted that this order entered in November dismissing the case in the Federal Court without prejudice was entered without any notice to the defendants, as far as the plaintiffs were informed.

The Defendants here rested.

516 *Plaintiffs' Rebuttal.*

(1) ARTHUR LEFEVRE was called by the plaintiffs and testified on their examination as follows:

That he is a member of the Efficiency Committee of the Texas Company and that his chief regular task is to edit its journal called "The Texaco Star" for distribution to employes and stockholders. That he had pursued mathematics as his study and profession, and has the degree of Civil Engineer, and taught mathematics for many years at the University of Texas and elsewhere, and had written upon mathematical subjects the book entitled "Number and its Algebra."

The witness was handed the final I. & G. N. Railway formula used by the State Tax Board, and the final Texas & Pacific formula used by the State Tax Board in 1915, and set out in the evidence above, and was asked to explain them. The witness stated that he would commence with the Texas & Pacific formula, the other being based on it, and stated that the theory of these calculations was that the ratio of the average gross income to the total capitalization had a bearing upon the value of the capital stock in estimating intangible assets, and stated that since gross receipts will never equal capitalization, that ratio will always be expressed by a proper fraction, and that when you multiply the capital stock by a proper fraction one will reasonably or unreasonably, necessarily reduce the amount of the capital stock, or the value thereof, and that the lack of universal arithmetical propriety in the method appears from the many varying results.

The witness further testified that he was testifying upon a mathematical basis, and called attention to the fact, as he stated, that the factor or multiplier so obtained, that is, the ratio between the average gross receipts and capitalization will always be a proper fraction.

That coming to the I. & G. N. formula and applying the T. & P. formula to it, as applied in the I. & G. N. formula, the mathe-
517 matical result was reached there by three steps. That to divide the I. & G. N. ratio by ⅛ and then to multiply by the quotient, is precisely the same as if one had multiplied the gross receipts of every other Railroad than the T. & P. by 8, and that this seems to be the clearest way to explain the matter, that that was what was done in each case where the T. & P. formula was applied and entered into the formulas of the other Roads, and that if the calculator had realized that all he was doing was to multiply the gross receipts, that is, the average gross receipts, of such other Rail-

road by 8, then the calculator would have done that in each instance, instead of pursuing the longer process, to-wit: That is, that the calculater apparently did not realize that what, in effect, he was doing, was multiplying the average gross receipts of every Railroad to which he applied his process, (except the T. & P.) by 8 and then dividing that product by the total capitalization to get the multiplier used by him when applied to the stock of the Road; in the case of the I. & G. N. 2.68, which would be the quotient of the division. That this was precisely what was done, and that if one had understood what he was doing, the calculater would have proceeded in that way or he would divide the average gross income by the total capitalization and get the figures in the case of the I. & G. N. .3353 and multiply the .3353 by 8, which would give him the multiplier, the calculater used 2.6824 and that was the arithmetical effect in each case where the formula was applied, except in the case of the T. & P. That it appeared that the gross income of the T. & P. Railroad happens to be to its capitalization ⅛ and that the calculater thereupon, in effect proceeded in other cases and multiplied the gross receipts of the several other Roads by 8.

At this point the defendants made an objection, which was overruled and over the objection and exception the witness proceeded. That he could only recite the process adopted and followed in forming these formulas, that the ratio of the gross receipts to the total capitalization of the T. & P. was ⅛, and in every case the cor-
518 responding ratio between the gross receipts and capitalization would necessarily be a proper fraction, and that if in all cases the capital stock of each railroad had been multiplied by this proper fraction or ratio, whether it be ⅛ or ¼ or what not, then necessarily the result would be to reduce the value by this process of the capital stock and that this was done in the first case, that of the T. & P., but that after that the person drawing up these formulas had taken three numerical steps, two or long division and one by multiplication, and had done this to get a result which is precisely the result which would be obtained by taking 8 times the average annual gross receipts and dividing that by the total capitalization, which was given as a quotient, the figure used to multiply the capital stock in each case, other than the T. & P. and that in the case of the I. & G. N. this figure is 2.68 and that the only question was whether or not this was a justifiable calculation. There was no question of correct figures; that it was impossible that it could be just to all, that it was not just to take 8 times the gross receipts for any of them. That following the processes used it could not be rationally maintained that the results put the railroads on a parity mathematically with the T. & P. Railroad, that of course they did not. The witness was shown the formula used in case of Ft. Worth & Rio Grande and that used in the case of Houston East & West Texas Railroad, in evidence above, and said the same methods were applied as in case of the I. & G. N. Ry. except an error in addition of a small amount. That the witness had nothing to do, however, with the question of physical values considered in the calculations. In the case of the formula

of the Houston East & West Texas Railway, the ratio between average gross income and capitalization was .278. In the case of the T. & P. it was .125 and that multiplying by .125 the calculater got a result equivalent to dividing by 8, for .125 is equal to ⅛. In the case of the Houston East & West Texas R. R. the calculater's process gives him a multiplier of 2.22 by which he multiplies the
519 capital stock. And so, in every case, leaving out of consideration modifications as to physical value with which the witness said he did not concern himself.

The witness's attention was then directed to the formula in evidence above used by the State Tax Board in the case of the Ft. Worth & Rio Grande Railroad, and said that that was even a clearer illustration of the calculator's method. That the ratio found by the calculator for the T. & P. was .125. For the Ft. Worth & Rio Grande .119 which approaches .125 and that if, in the case of the F. W. & R. G. Ry. the calculator had done as he did in the case of the T. & P. that is multiplied the par of the capital stock by .119 he would have gotten about ⅛ of its par instead of which he divides .119 by .125, which gives him the quotient 95.68 which he uses as a multiplier, whereby he gets $2,800,000.00 about as the actual value, which is $2,928,300.00, whereby, instead of, as in the case of the T. & P. taking ⅛ of the par of the stock, he has taken as its true value more than 95% of its par, making a difference against the F. W. & R. G. in comparison with the T. & P. of over $2,000,000.00 on stock.

Turning to the formula used by the State Tax Board in the case of the Houston & Texas Central Railway Company, the witness said that it did not work out on a mathematical parity with the T. & P. Railroad as calculated upon its formula, that he could offer no other explanation than that which he had offered before as to the other Railroads. That when one is dealing with ratios one has to be careful. That it was inconceivable that the same factor with regard to gross receipts should apply to every railroad, and that it is not conceivable mathematically that a mathematical, rational and clear process has been pursued where this formula based on the T. & P. has been applied, and that the system was adopted where the T. & P. formula has been applied as a mathematical proposition necessarily operates to reach widely variant, unjustifiable mathematical results.

The witness stated that he was a member of the Efficiency
520 Committee of the Texas Company which had a capitalization of over $44,400,000.00 and had examined some of its plants as a matter of personal interest, not with the delegation of any authority, and that as an engineer or mathematician he knew the difference between gross income and net income and had studied the relations between gross income and net income and values of corporations.

Over the objections and exceptions of the defendants he further testified that in accurate accounting the gross receipts in any business whatever had no possible direct numerical relation to true value, because a business might receive an enormous gross income and be plunging toward bankruptcy, and that if accounting be accurate, the

value of any business depends on its net profits, except that it is evident that there might be speculative value in ownership, and that these he took to be indisputable economical principles. That he was not speaking of railroads as distinguished from any other business, but that he included the hypothesis of good management and accurate accounting, and including that, stated that the net profits over a long period are the only fair basis for estimating true value, excluding, however, in some cases, assets not utilized. For instance: an iron foundry might own ore lands not yet utilized and which, therefore, would not affect income and yet would have value. The witness stated that with these reservations he had answered the question as a matter of universal business.

The witness stated that looking at all of the formulas introduced in evidence, taking the basis of gross income thereon as the beginning basis of calculation, in order to determine values, and looking at that element alone, that as between a great number of corporations these formulas would grossly err, because, for one reason, the factor derived in each case was applied only to the capital stock. All this application affects only the capital stock, and that it is evident that in different cases, different parts of the capitalization would be thus
521 represented, and therefore, that all of them could not possibly be treated on a parity by any such procedure. That these formulas or calculations have not in this respect, been applied to the capitalization represented by bonds at all, the bonds being added to the result obtained by multiplying the capital stock by the unreasonable factor. That it is perfectly rational, and the witness said he might say necessary, to assume that there would be no fixed relation between gross receipts and net profit or income, on the different railroads, and that it would be variant, of course in each railroad, but that in these calculations it was assumed mathematically to be proportionately consistent throughout, and that this was an unacceptable assumption not to be accepted in reason. That a rational man could only follow these formulæ and calculations introduced in evidence through inadvertence and failure to exercise reason after critical analysis, and that a man may be rational and make these mistakes, and that these calculations have no foundation in reason, and are not susceptible of being reasoned, except to be destroyed by the use of reason. The witness said that he thought that he had explained adequately and analyzed adequately the formulas and calculations, unless it was desired to explain the psychology of such slips, and on request of the plaintiffs and of the court stated, that it was in every man's experience how prone the mind is to fail to get within its intention all the matters involved in an unfamiliar proceeding; that it would be abhorrent to the common sense of a man to sit down and multiply the annual gross receipts of all the other railroads, except the T. & P., by 8. That his common sense would revolt against doing that, and that the calculator had failed to notice that this was what his work amounted to, as plainly psychologically indicated by the round about way he figured, getting that very effect when he might have reached his result with far less calculation, and that it was his firm belief that the person making these formulas and calcu-

lations did not know that he was multiplying the average annual gross receipts by 8; that he had watched the psychology of
522 these processes in thousands of students, many thousands of them. That in fact the calculator multiplied the average gross receipts by 8 and divided the result by the capitalization, or did the equivalent of that without knowing it, and that there is no reason whatever for this, because the ratio of gross receipts to total capitalization of one road is ⅛; that thereby the gross receipts of every other Road should be taken to be used as if they were 8 times what they are, and that this could not be maintained when squarely faced.

Cross-examination of the witness Lefevre by the Defendants:

Asked to state the psychology of determining what is in another man's mind without knowing anything about the facts before this other man, the witness said that there are very many plain evidences; that when a reasonable man follows an unreasonable procedure in calculation and that the inference is not that the particular man has no sense at all, but that he was confused by the transferment of symbols; that he had failed to reason where he should have reasoned, and that that was the psychological inference from such facts.

The witness stated that he knew nothing about it, except what appeared on the formulas and calculations.

That speaking of the relation of incomes to valuations, he thought that the test would be more often correct if made by net income than gross income. That it depended upon what one did with the gross income. That in testifying on this matter he had not merely railroads but all business in mind. That in the longrun the same test would apply to farming, except that he had made the exception of assets not being used, which have a value, though they make no income. That if it be supposed that for a period of 28 to 46 years the farmers of Harris County had not been able to make any net income at all that his test would not show that the land was worth less than nothing, but that he would feel that if the assets had been used by a better process the land could have been developed, but that if it was impossible to make anything out of the prop-
523 erty, that is, the land of the farmers, it would be worthless, but that it would not result from the mere fact that the farmers had made nothing that the land was worth less than nothing, and that he, the witness, had never so stated, but that on the preposterous assumption made, the land would *would* be worth nothing, but that he, the witness protested against the assumption.

That coming now to assets of farm lands really used, the witness said that it was unthinkable that the land could have no possible value, that it was good for something, but that it was not unthinkable that his test would apply, that he made no such test as was put by the examiner, but was talking about going businesses, and that he now said that if a business is going broke and pays, he would say, 50¢ on the dollar it must quit unless it has unused assets which it may realize. That one could not make an arbitrary rule to fit all

cases to the best of witness's judgment, that one should look at the conditions surrounding each case. That sometimes things are so simple that a rational formula can work substantial justice, but that absolute accuracy could not be obtained in this world.

The witness said, that assuming that one piece of property produces a gross revenue of $10,396,700.00 per annum, which had a ratio to its capitalization of .3353, and assuming that another piece of property produced a gross income of $11,889,042.00 having a ratio to its capitalization of .125, that it did not follow that the first piece of property was worth more than twice as much as the other on that basis. That he, the witness, had never said that gross receipts were beyond the reasonable purview of an Assessor, yet he said that their bearing would depend on the efficiency of the management, that he believed in the reality of intangible assets if the net income yielded large net profits beyond the reasonable returns from its physical properties which are otherwise assessed and taxed, then the difference between the true valuation and physical assets are
524 intangible assets, but that it was a question of fact in each case whether there was anything in it for the owner of the property, but that if the ownership was worth nothing to the owner, then there are certainly no intangible assets "unless it be in regard to fair hopes in the future. It might be worth a little something in the market, on account of hoping for better systems of taxation, and so forth." That the witness had no objection to answering the examiner's question and had tried to do so. He was then asked this question:

"Supposing one piece of property produced a gross income of $10,396,079.00 bearing a ratio of total capitalization of .3353, and suppose that the other piece of property produced an annual gross income of $11,887,042.00, bearing a ratio to total capitalization of .125, then assuming that it was proper to take gross income as the criterion to get at the value, would not the first piece of property be worth twice as much as the second on that basis, or more than twice as much?

A. No, sir.

Q. Why?

A. It would not be worth twice as much, let alone eight times as much."

That the proportion of .125 to .3353 was 2.68 or the ratio. That proportions had to be founded on reasons, but that if the questioner assumed that he was correct, that he was correct on his assumption, but that he, the witness, was not dodging, that it was not true that all he knew about the formula was summed up in the proposition that they involved multiplying gross income by 8, but that he considered that the most conspicuous fact.

The witness was then examined by the court and testified that if it be assumed that the processes were correct and truly reflects the value of the T. & P. that the process further pursued might or might not reflect the true value of some other road, but that the calculator had not followed the T. & P. process in the case of any other road, but that if he had followed the T. & P. process in the case of the other

roads he would not be multiplying by 8, but that in the case of the I. & G. N. he would have been multiplying by ⅛ and in the case of the T. & P. by ⅛. That the calculator had not used a
525 difference in any case, but had used a quotient which is entirely different, and had been confused with ratios without realizing his confusion, and so, had worked the havoc.

On further cross-examination the witness was asked to assume that the T. & P. Railroad produced a gross income of $11,887,042.00 per year, and that it was proper to ascertain the relation between gross income and capitalization in the case of the T. & P. .125 and then to assume that there was another piece of property producing an annual gross income of $11,396,079, which bore a ratio to total capitalization of .3353. Then assuming these things would or would not the stock of the second piece of property be worth 2.68, as much as the stock of the first? The witness answered, no, it would not, that the calculator had not realized that he had been multiplying when he ought not to multiply. That it would be preposterous to anybody when the ratio would be enormous. That dividing .3353 by .125 one gets 2.68.

Redirect examination by the plaintiffs:

The witness stated that he noted that the final worked out capitalization of the T. & P. by its formula was a little over $61,000,000.00 and of the I. & G. N. $31,000,000.00, and that he had understood defendants' counsel to ask him in substance whether or not the problem could be worked by the rule of three and that he said "no," the problem could not be worked rationally by the "rule of three," that it is a question of difference, and that the calculator who made the formulas uses the word "difference" as the witness understood, but that he did not use differences in his calculations. That there are all sorts of numerical relations, and that one can add, subtract, multiply, divide and take roots. That there was any safe way in supposing that if a capitalization of $31,000,000.00 would yield gross income of $10,000.00, then that it must be worth more than the capitalization of $95,000,000.00, which would yield a gross income of about $12,000,000.00. That this had no relation to a right
526 calculation, but that of course, the income is something to be considered. That there must be a gross income before there could be a net income; that it was evident that one road, by various circumstances, would make a proportionately much higher income. That there would always be some approximation towards justice to do it, as it was done by the calculator in the case of the T. & P. where he had multiplied the par of the capital stock by ⅛, which resulted in taking a fraction of the par as the true value. But that the T. & P. method would approximate, but that in all the other cases it was not so multiplied by a fraction.

In answer to the question of the court, the witness stated that if a business capitalized at $95,000,000.00 was producing a gross annual income of $11,000,000.00 and if its capital stock was worth 12½¢ on the dollar, then that it would not work out on the basis of

the calculator, that a business capitalized at $30,000,000.00 produced a gross annual income of $10,000,000.00 would have stock worth 2.68 of par. That there was six terms involved in the calculation, and that when the calculator's formulas had no reason to them it was very hard to put the finger on the trouble, that the proportion has only four terms, and that the calculator was using six terms, and that the rule of three did not apply to his method, and that the calculator had lost sight of true methods, and that multiplication runs up trouble, that it was a case like paying 1¢ for the first horse shoe nail and 4¢ for the next and so on for 32 nails, that it would run into millions to shoe a horse.

The witness was again cross-examined by the defendants. He said that he was no searcher of hearts, that the calculator had been confused and had multiplied at the wrong time. That the unknown quantity sought was the value of the stock, with the view of getting as an ultimate the value of the intangible assets. That there are three terms used in the rule of three, three known and one unknown. That the calculator in the calculations under investigation had two capitalization and two gross receipts. That the calculators did proceed on the theory of comparison of ratios, first getting the ratio between gross receipts and capitalization, and then comparing that ratio with the T. & P. ratio, but that then the calculator proceeded to the third step taking that which they had already gotten, that one cannot stop with the first step finding the ratio between the gross receipts and capitalization. Having taken that step next the ratio of that ratio is found, and then the calculator proceeded to multiply the amount of the capital stock by that final product getting two products, or one product and one division.

527

Starting with the T. & P. the ratio of its capitalization to its gross receipts is found to be 12.48 which is stated to be coincident with the market quotation of the stock, to-wit: 12½¢ on the dollar. In applying that ratio to the I. & G. N. the calculator or calculators never applied the rule of three, but made a simple multiplication of the quotients, dividing one ratio by the other. That gross receipts would net income, if it be assumed that the earning capacity of the I. & G. N. dollar and the dollar itself is .3353, and that the earning capacity of the T. & P. dollar is .125 then the I. & G. N. dollar would be most valuable.

The witness said that he understood the formula and calculation used in the case of the I. & G. N. to be "just as a rigmarole of calculation which has no bearing to the total." That about what the calculator or the Board did, was taking these ratios in round numbers, that no body has challenged the calculation, it is a question of method, and it is a question whether it is proper to take the ratio to the gross income, that if the formulas and calculators are right, they are right, but that there is no reason on earth to suppose that the I. & G. N. stock should have a true value in comparison with the amount of the T. & P. in the ratio of these two ratios. The court said:

"Q. Let us assume that that is the proper way. The ratio of the

T. & P. is to the ratio of the I. & G. N. as the capital of the T. & P. is to X. Would not that be proper?

"A. No, sir."

But that was the process used. That if one assumes that
528 it is correct to take the ratio between capitalization and gross receipts, nevertheless the formula does not work out right. "You have taken the ratios of these two ratios, each one is a compound thing, which came by division." That is the way to get a ratio, that if one would assume that the true value of the stock, the ratio of the true values of the stock will be the ratio of these two ratios, then it would be correct, but it is necessary to have an affirmative reason for making any such calculation.

Redirect examination by the plaintiffs:

The witness said that supposing that there were two farmers who had two farms, both working diligently and well, using all of the assets of these two farms. Then suppose that one farm cost one farmer $12,000.00 and yielded him net 1%, which would be $120.00, and that the other farmer had a farm which cost $4,000.00 and yielded him net $120.00 or 3%; then supposing that this experience of a net annual income of 1% and 3% respectively, was the experience of a long term of years, and capitalizing the income at 6%, then both farms would be depreciated, and each would be worth $2,000.00. That the big farm would be depreciated and the little farm would not be appreciated, but both depreciated. That in the case which is under consideration the calculators have depreciated the T. & P. and appreciated the I. & G. N. by taking, in effect, 8 times the average gross receipts of the I. & G. N. That if the income had been the same over an experience of a large number of years, capitalizing at the same rate of interest, the properties would have been worth the same. That the Board or calculators had used a ratio of ratios and so had piled the calculation up. That if we suppose another railroad, the image of the T. & P. in its figures had exi-ted and the method of the Board applied, then one would be divided into one and there would have been a quotient of one, and then we would have a situation, applying the formula where one railroad's stock would be at par and the T. & P. depreciated, that
the calculator or calculators made another ratio out of two
529 ratios, that this can be done on paper, and that you can put it down and multiply it out. The witness had not figured out their multiplications; that there are clerical errors in the placing of the decimals.

Recross by the defendants:

The witness said that if a counterpart was taken of the T. & P. the same figures and data, the ratio in each case being .125 that one would come out exactly with the same results as in the case of the T. & P. but that the Board of calculators had not done that, but divided the ratio by the ratio and that dividing .125 by .125 you

have one, and then that dividing or multiplying the par value of the stock by one and you get the par value of the stock, and not the same result as in the case of the T. & P. for the par value of the stock, but 8 times that amount, and that in the case of the H. & T. C. that came very near being done, and that a Railway Company with a capitalization and the same annual income as the T. & P. figured out just as the I. & G. N. is figured out, would not have the same valuation of stock as is given to the T. & P. but 8 times the amount, and that if one was going to compare ratios with that imaginary railroad it would not be true about ratios of ratios; that the T. & P. ratio is to the ratio of the unknown road as the T. & P. is to —. That this would not be true mathematically, but that if one did that he would simply say that he was taking the identical terms of the stock of one and the stock of the other, the earnings of one to the earnings of the other. That this makes sense, but whether one gets results is another question. That applying the Board's method to the imaginary railroad, identical with the T. & P. in its statistics, that would appreciate that road as a mathematical proposition by appreciating its stock 8 times what was calculated in the case of the T. & P. That assuming that there was an unknown railroad the ratio of whose average gross income was to its capitalization of 1/10, and the ratio of the T. & P. being 1/8 or .125 and the
530 value of the T. & P. stock as found by the Board $4,845,476.00 the problem could not be worked because the data for the problem was not stated. That one would get a smaller value than on the T. & P. because one had a smaller amount, but the witness said that applying the process used by the Board or the calculator, that every time in comparison with the T. & P. the value of the stock found by the other railroads would be appreciated; that he did not mean that if you had little road that did not have but a small amount of stock, that it would be larger in its result than the T. & P.

That the witness did not observe any intrinsically constant factor in the calculations. That two elements were always involved, to-wit: The gross receipts and the total capitalization of the T. & P. and therefore all that these elements involved are involved in the calculations, but not in any constant relation. That if one should grant, for argument sake something not true, one could prove almost anything, and that everything that is involved in the T. & P. ratio of .125 is necessarily injected in every other of these calculations. "That is a matter of fact, not in the form of what we mean in mathematics as a constant factor." That the value found for the stock of the T. & P. $4,845,000.00 appears in all of the calculations, because it came by multiplying the stock of the T. & P. by .125 the same as dividing by 8, and that the gross receipts and total capitalization of the T. & P. are involved in all of these formulas, but that mathematically the witness does not call these constant elements in these calculations. That they are not elements of calculation in any strict sense of the word, except that one uses the ratio always to multiply the other ratio by.

(2) W. J. WERNER, the Auditor of the plaintiffs, was called by the plaintiffs and testified:

His attention was directed to the comparative balance sheet of the I. & G. N. Railway for the year ending June 30th, 1914, introduced by the defendants. With reference to $37,243,133.44
531 set up therein as property investment, the witness said that those figures represented the book investment as reflected by th Company's books, that is, by the I. & G. N. Ry. Company, the expense to it as set up on the books for the acquisition of the properties, and the figures represented the cost of the Railway to the purchasers included prior liens subject to which the property was sold, and which are carried into those figures, and cash items in addition to the liabilities involved in the decree of foreclosure. That off-hand he could not say what was the amount of these cash items, that it would take some time to analyze the figures which were included on June 30th, 1914, in addition to the original cost of the property to the I. & G. N. Ry. in Sept. 1911, additions and betterments after that date which he could not state roughly off-hand, but it was thought that this was already in evidence. That this balance sheet is finally balanced at $51,117,103.78, which included the book cost, with additions and betterments of the physical properties plus the expenditures to the date of the report, and that as of the date of the report the physical properties cost the I. & G. N. Ry. Co. $37,243,133.44. That deductions would be property abandoned, included in investment account, which is abandoned, as $82,700.00 worth of rolling stock and equipment deducted, but which was deducted from the gross addition to betterments and expenditures. That at the time that the time that the I. & G. N. Railroad property was acquired .. 1911 he thought the cost to the new Railway was $32,000,000.00 plus, but would have to look at the books and would not state positively; that approximately $1,300,000 was put up to finance the Road with actual cash, in order to pay off burdens created by the I. & G. N. Act, so-called, of September, 1910, and that this sum was all consumed for that purpose he thought, except about $150,000.00 odd, and that the cost of the road included in 1911 in the figures of $32,000,000.00 plus all burdens, liens and liabilities against it at that time. That as to the footing of the balance sheet a grand total of $51,117,103.78, that footing did not show the value of the Railroad. That the
532 First Mortgage of 1879 still in existence on the properties bore 6% interest, the Colorado Bridge Bonds bore 7% amounting to $198,000.00 in 1914.

There was handed the witness the answer of Mr. Bagby, Mr. Terrell and Mr. McKay filed in the Federal Court, and the witness said that he had it yesterday and had read it over and considered it. That under Section VIII. of the answer he found some duplicate items contained in the calculation. That section was intended to show the true statement of the stocks, bonds and lien indebtedness outstanding, and that it contained, according to his investigation, these duplications: Taking paragraph (*b*) of this answer, which has been included in the defendants' testimony above, he said that the item stated of "bonded debt and other obligations" included a subordi-

nate item of amount given as first refunding 5 per cent gold bonds $2,641,000.00, which last item, according to his analysis contained first refunding mortgage bond issues as follows: $1,600,000.00, $506,000.00 and $535,000.00, all of which items are again included in tabulations shown as recapitulation of paragraph C. The item of $535,000.00 and $506,000.00 being specially set out; and that the item of $1,600,000.00 is included in the item of $13,750.00 shown under recapitulation C in addition to the $1,600,000.00 just referred to, the $12,150,000.00 first refunding bonds being issued and pledged as collateral for $11,000,000.00 evidenced by the issue of three-year notes, which notes were included in the recapitulation of Section C, thereby duplicating that amount. In other words, the $11,000,000.00 is specifically set out and then is again included in the $13,750,000.00. In order to get the footing of $49,993,100.00 the $11,000,000.00 is included twice. These seem to be the only duplications. That there is an error in stating the amount of the outstanding common stock as $1,442,000.00, whereas it should be $1,422,000.00; the total stock outstanding is $4,822,000.00 instead of $4,882,000, as stated in the answer, and that there is also included in the calculation an item of accrued interest on the $11,000,000.00 notes amounting to $550,000.00 which is neither
533 stocks and bonds but defaulted interest. That in order to correct the calculations the amounts to be deducted consist of $11,000,000.00 duplicated, $2,641,000.00 first refunding bonds duplicated, $550,000.00 item of interest and $60,000.00 error in calculating capital stock, or a total of errors of $13,251,000.00, which, deducted from the grand total shown in the answer of $49,993,100.00 leaves $36,742,400.00, which includes the Interim Certificates, the par of which is $5,078,000.00, and deducting the Interim Certificates there would remain a residue of $31,644,400.00. That there is another apparent error in the calculation showing the Colorado Bridge Bonds at $225,000.00 outstanding, there being only $198,000.00 and that these are all the errors which he sees in the calculation.

The witness was cross-examined by the defendants. He stated that outside of the $1,600,000.00 and the $535,000.00 items the transactions were not completely described in the answer. The answer was incomplete in that the item of $11,000,000.00 were notes protected by bonds as collateral, and that therefore it had been duplicated in the answer in the Federal Court. That it was correctly stated in paragraph of sub-division C, but that there is no deduction made for this duplication, and that the interest does not purport to be stocks and bonds unless carried under the heading, the explanation showing that this interest on the $11,000,000.00 debt calculated to August 1, 1914, and also stating that it was secured by a mortgage or other lien upon the property.

(3) SAM H. DIXON called by the plaintiffs, testified:

That he is at present with the State Department of Agriculture, Chief of the Bureau of Marketing, and that he had paid attention

to agriculture, his life business being that of a farmer, and that he had farmed a great deal, born and raised in Hays County, and farmed there until he was 25 or 26 years of age, and in this part of the State in Montgomery County for 27 years, immediately North of Harris County. That he might say that he had been a student of agriculture, being the author of several books on that subject,
534 and that he had theoretically and practically devoted a large part of his life to agriculture and is today the editor of an agricultural paper.

The bad storms came in the Coast country, at times very serious ones, especially in the immediate country, coming at irregular periods, that there was a bad one in 1900 and another in 1915, and lesser ones in different localities in South Texas in between. That a large portion of Harris County is badly in need of rain, and that the drainage ditches, where constructed, have been constructed with little attention to developing the drainage system. That there are several types of land in Harris County, a great deal good cotton and corn land, very productive in the growing of those crops, and a good deal is devoted to rice culture, that can raise good crops of rice, and except where truck crops grow exceedingly well, and some land on which strawberries, figs, citrus fruits are growing successfully and a great deal of land is devoted to general agriculture. That the lands are, generally speaking, in Harris County, adapted to general agriculture, and varieties of crops. That speaking of the land between Houston and Clear Creek, the boundary of Galveston County, and those down towards Brazoria County; the witness said that he considered they offered a great opportunity for development, and that where the proper system of agriculture and drainage was used, they would not only be fertile but productive.

Over the objection and exception of the defendant, the witness answered that he would grade these lands as worth, to a competent farmer in 1915, according to their different qualities, as ranging in price from $15.00 to $50.00 per acre, that is, the lower part of the County between Houston and Brazoria and Galveston Counties. That a good deal of the land towards Brazoria had been poisoned by what is known as escaping gases, deposits of poisonous substances beneath called "white spots", and that these lands are not as valuable as the others. These "white spots" will not produce anything until the poisonous conditions are destroyed, but that these
535 can be overcome, but that they are of small value for agriculture or grazing, and do not even produce grass. That he could not state the percent of these white spots to the total area, but that it was small. That in referring to $15.00 land he did not mean to limit himself to any section, but to the county in general, that in the Northwestern part of the County was a large territory of very thin land underlaid with clay and the same character of soil between Houston and Humble, not first class agricultural land, but which he would place at $15.00 per acre, but worth that as diversified agricultural and stock farming as well as the growing of crops. That by stock farming he meant growing stock on the farm in connection with general agriculture, and feeding stock,

especially where the farmer would grow his own meats. That i
the county is a large area of very fine and productive land, for in
stance, from Crosby to Cedar Bayou there is no better agricultura
section in South Texas, south of the T. & N. O. railroad, a great dea
of it well drained and settled by very prosperous farmers, and als
around Pasadena in the territory tributary to the Ship Channe
and Buffalo Bayou and down towards La Porte and Strang, that th
hog wallow land around La Porte is very fine, and a good deal of i
what one would call stiff soil. That these are more valuable for ag
riculture than the light lands, but not so valuable for growing truc
and fruits as the light lands. That the Satsuma Orange industr
had had large misfortunes, as orange industries had in Florida an
California. That in the county average cotton and corn crops wer
grown, above the average for the State, where good agricultura
methods were employed in some instances. That in the Crosb
section down to Cedar Bayou the land would produce about ½ bal
an acre of cotton, some years it is more and some less, but the ave
age has been good, but that the average for the State of Texas i
about 550 pounds of seed cotton to the acre, or considerably over ½
or something like 1/3 of a bale to the acre. That the average cor
crop in Texas is about 19 bushels to the acre, increasin
536 somewhat of late years. That the Crosby and Pasadena di
tricts in Harris County will exceed that a great deal and tha
he has seen 60 to 70 bushels per acre produced where special atte
tion was given. That the Dairy District was stiff, black land, an
"buckshot" land, about on an average to the lands at Crosby. Tha
the sandy lands without fertilizing would produce on an average
ten years about 1/5 of a bale of cotton to the acre, and 12 bushe
of corn to the acre in Harris County, these being much poorer land

Cross-examination by the defendants:

That about 60% of Harris County is black land, and that abo
25% of the land in the County was in cultivation. That it woul
be hard to say what was the proportion of the best lands. That th
farmer attempts to work more than he can work, and that the
are variant capacities, some can cultivate 25 acres, another poor
15 acres and work just as hard. The farms in Harris County a
not large. That taking the territory between Houston and Galve
ton 15 acres would be the average farm; between Crosby and Ced
Bayou the farms were larger, averaging 100 to 150 acres cultivati
part, but leaving out of consideration rice farms; that about Dai
the farms are 15 to 40 acres, but that they get larger as one ge
away from the city, the farms having more than that under fenc
having stock in connection with the farms. That the Northeaste
part of the county is a stock region, many growing feed to care f
stock. That the farmers worked their children, daughters and so
on the cotton and corn farms, and hired very little outside hel
That 20 acres in corn is as much as one man should undertake, a
that no man could take proper care of 20 acres in cotton, even wi
improved instruments, that farmers do not hire much help, if th

do, then among their own people. That the foreign farmers do not go to picnics and barbecues like the Americans, but devote more time to their farms. That the price for cotton picking ranges from 50¢ to 80¢ per 100 and sometimes $1.00 per 100. That they generally commence by boarding the pickers and paying 50¢
537 to 60¢ per 100, and that the cost for picking a bale would be $8.00 to $12.80, but that there was not much cotton picking hired in this county, the county producing from 6,000 to 7,000 bales per annum, in 1900, about 5,000. The production has increased each year with exceptions. That in stiff lands it requires strong, sturdy teams to do the work, most of them have mules or improved grade of horses, using from 3 to 4 teams, according to the size of the farm. That the highest price cotton has been about 17¢, a big price which does not represent anything like a normal price, which would be 10½¢ to 11¢, or from $55.00 to $60.00 a bale, the seed being worth from $18.00 to $40.00 a ton, or from $9.00 to $20.00 a bale. That a farmer might or might not, on the best land, produce ½ of a bale to the acre, and on 20 acres might or might not come out the year with gross receipts for cotton of $800.00, but that on the crop he certainly would make that much money, but that this included the value of his own labor and his operating expenses, and his investment and any depreciation and the work of his children; that men with larger families generally made larger crops, and the use of his teams and tools, and that the average production of a Texas farm for 10 years is something like $500.00. That the witness did not know what the farmer's labor was worth. The witness paid $25.00 a month and board when he hired men, and that he hired a great many men at that price. That he had had charge of the Penitentiary System for a long time and estimated that a man was worth $30.00 a month in the production of ordinary Texas crops, that is, a convict, who, he thought could not do more work than a free laborer, and was hampered in many ways, and that he thought a free laborer was worth that. That board to a farmer producing his own milk and butter and meats would cost $5.00 to $6.00 a month, that a farmer did not make much money, but a great many of them as such as they are worth because they are unskilled; that it is pretty hard to place the value of a man's labor, they are varying in their values. That it is hard to eliminate the question of improved values; that an industrious farmer with
538 20 acres of land he has some live stock and this live stock would increase. That it is a deplorable condition for a man to depreciate his farm every year. That a man should have more than 20 acres of land in order to graze his stock. That he had answered the question as to present values, that it is hard to estimate the prospective ones. That if we had good years without storms or destructive freezes lands will go up, but if we had disastrous years they would not, but that they would not decrease in value. That he did not think there was any possibility of their decreasing. That the most severe freeze in the Coast country was in 1835. In 1844 there was a storm North of Corpus Christi, in 1875 there was a

storm, in 1878 the witness thought, another in 1900 was the next serious one, and the next one in 1915.

That he had testified as to general averages of lands throughout the county. That he did not know any land in Harris County selling for $5.00 or $6.00 an acre, that he had not noticed the Houston Post reports of land sales for the last week or two. That he was constantly with the farmers of the county, as it was his business to be, and he generally knew what they paid for their properties, that Harris County was an old county, and that they have been farming here a good many years, some farming even under the Republic of Texas, and that it was only of recent years there had been any development of agricultural conditions.

Redirect examination:

That leaving out soft flats or tidal or marsh lands or land, as to which the title may be bad—that he knew of no bona fide sales or trades in this county in recent years at $5.00 per acre. That farming lands, unimproved in the general vicinity of Dairy was selling from $25.00 to $50.00 per acre. Around La Porte that they had sold for exorbitant prices and not sane prices, the land being really worth from $25.00 to $50.00, and having been sold from $100.00 to $200.00. That towards Waller County he had known 12 years ago of a farmer buying a large fine tract for $10.00 an acre, he then being Industrial Agent for the H. & T. C. R. R. That land had not gone down. That around Huffman he had known of
539 second rate lands being sold at $7.00 or $8.00 an acre North of Crosby, but that this was not cut over land, that the virgin timber land was very high, but he was testifying to prairie land.

(4) It was admitted in open court that the orders of the Federal Court copied in the supplemental petition of plaintiffs filed February 10th, 1916, was correctly stated therein.

(5) The plaintiffs offered in evidence the order signed by Judge Burns granting a stay order, and setting a hearing therein referred to for the 15th of July, 1915. This order being dated the 5th of July, 1915, and being set out above, and it was admitted that this order had been duly served.

(6) W. J. WERNER, Auditor of the Plaintiffs, was recalled by the plaintiffs and testified that he had made the figures to show the total obligations of the Receivers and the Railway existing Dec. 31st, 1914, and that eliminating stock, these figures amounted to a total, including unpaid interest on that date of $30,574,470.85 consisting of the following items:

Bonds	$26,280,000.00
Equipment Notes	1,052,000.00
Floating debt	3,042,470.85

To this testimony the defendants objected, and over their objection and exception it was admitted. In floating debt was included the

vitness stated, matured interest, although not due, as well as due nterest.

The plaintiffs rested and the evidence was closed.

540 In the District Court of Harris County, Texas, 80th Judicial District.

No. 68800.

JAS. A. BAKER and CECIL A. LYON, Receivers of the International & Great Northern Railway Company, and International & Great Northern Railway Company

versus

KARL L. DRUESEDOW, Tax Collector of Harris County, Texas, et al.

It is hereby agreed that the foregoing pages, numbers 1 to 401, to which this certificate is attached, contain and are a true, correct and complete statement of all facts proved on the trial of this case, and all matters in evidence bearing upon any controverted issues of fact; this statement being complete of all evidence whatsoever adduced upon the trial of this case.

There is, however, made a part of this statement and attached hereto, as Exhibits thereof, certain maps numbered Exhibits 1 to 24 inclusive, and Exhibit "1A," being true copies of the maps introduced in evidence, and to these maps our certificate is attached certifying that these maps are a part of this statement, it being impossible to bind up these maps inside of the foregoing pages.

Witness our hands this 14 day of June A. D., 1916.

JAS. A. BAKER AND
CECIL A. LYON,
Receivers of the International & Great Northern Railway Company, and
THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY,
Plaintiffs and Appellants,
By WILSON, DABNEY AND KING,
Their Attorneys of Record.
KARL L. DRUESEDOW,
Collector of Taxes of Harris County, Texas;
W. H. WARD,
County Judge of Harris County, Texas;
W. H. LLOYD,
J. A. SMITH,
W. H. KISER, AND
D. BARKER,
County Commissioners of Harris County, Texas, Defendants and Appellees.
SEWALL MYER,
By LUTHER NIEBECK,
Their Attorneys of Record.

541 The foregoing agreed Statement of Facts being this 14th day of June, —, submitted to me, including the accompanying maps, is by me in all things approved, having been agreed to by the parties, and having been found by me to be correct, and I do now direct it to be filed.

J. D. HARVEY,
Judge District Court of Harris County, Texas, 80th Judicial District.

[Endorsed:] Filed in Court Civil Appeals, Jun. 20, 1916. H. L. Garrett, Clerk. Filed in Supreme Court, Mar. 19, 1919. F. T. Connerly, Clerk.

542 PROCEEDINGS IN THE COURT OF CIVIL APPEALS OF THE FIRST SUPREME JUDICIAL DISTRICT AT GALVESTON.

Opinion.

Filed in Court of Civil Appeals Jun. 28, 1917. H. L. Garrett, Clerk.

No. 7339.

JAMES A. BAKER and CECIL A. LYON, Receivers, Appellant-,

vs.

KARL L. DRUESEDOW et al., Appellee-.

Appeal from the District Court of Harris County.

This suit was brought by the appellants as receivers for the International & Great Northern Railway Company, against appellee Druesedow, tax collector for Harris County, and the County Judge and members of the Commissioners' Court of said county to restrain the collection of the tax assessed against the International & Great Northern Railway Company upon the value of the intangible property found by the State Tax Board to be owned by said road and apportioned by said Board to Harris County.

The taxes assessed upon said intangible property so apportioned to Harris County, the collection of which is sought to be enjoined in this suit, amount to the sum of $6,605.34.

Plaintiff's petition is necessarily voluminous and it would serve no useful purpose to set out its allegations at length, or to give the substance of all of them. The tax is attacked as illegal and its collection asked to be enjoined upon the ground, among others, that the Railway Company had no intangible value upon which the tax could be levied. It is charged in substance that the valuation of the whole intangible property of the railway at $10,743,223.00 by the State Tax Board was the arbitrary fixing and attempting to create value that had no actual existence.

543 We adopt the following summary of most of the material allegations of the petition which we copy from appellants' brief:

"And that in finding the same did exist, the Board did not endeavor, in the words of the statute, 'to bring about a just, fair, equitable and lawful valuation,' but did state the existence of intangible property which did not exist, and against all evidence, upon a deliberated plan to suppose the existence of such fictional property, and that the Board did act for the purpose of subjecting to illegal taxation the properties of the I. & G. N. Ry., and for the purpose of collecting out of these properties, under the security of tax liens and preferences created by law, great sums of money because of the claimed intangibles."

"It was further charged that the railway had no intangibles, but that if it had any, which is not admitted, but denied, than that they were of no such value as stated by the Tax Board; that the plaintiffs were grossly discriminated against in the valuation made, by discrimination in favor of other and competing railroads arbitrarily and willfully made, and that the Board, by a false formula and by methods which no reasonable mind could in good faith follow, and through gross error and mistake, as well as by deliberated plan, did make this assessment."

It is then alleged that plaintiffs in response to a notice issued by the Tax Board under the provision of the statute to show cause why the preliminary assessment should not be made final appeared before said Board and in writing and orally protested against the preliminary assessment and mathematical formula which the Board applied in ascertaining the intangible values of the Railway, and requested the board to explain the formula and the Board's process in making the valuation;

"The Board refused to explain its process, or to state the bases of its action, and on what bases or evidence it was acting in mak-
544 ing this assessment, and refused to state why, in the formula, they had valued the stock of the insolvent and foreclosed railroad at $12,934,533.00, its par being $4,822,000.00, except that the Board insisted that the formula was correct.

"At this hearing no evidence was offered in support of the Board's action, and no reason given therefor, except the formula, but the plaintiffs proved without controversy the following facts:

"(a) The amount of stocks and bonds of the railway outstanding on December 31, 1914, including equipment notes, all taken at par, was $32,154,000.00, of which $4,822,000.00 was stock, and the R. R. Commission's valuation was $32,471,027.05, to which might be added additions and betterments not then valued by the Railroad Commission of book cost of $1,542,065.02;

"(b) The railroad paid interest at 6% on its first mortgage bonds amounting to $11,290,500.00, and partly out of Receivers' Certifi-

cates, and that the second mortgage had been foreclosed and interest on its bonds were in default;

"(c) The Tax Board was placing a premium of $8,112,533.00 on the capital stock of par $4,822,000.00, although this stock had been foreclosed and was worthless;

"(d) The properties had been foreclosed in 1910-11, and sold out, and unsecured debts of over $7,000,000.00 and third mortgage bonds of approximately $3,000,000.00, and a stock capitalization of $9,755,000.00 were eliminated and thrown away;

"(e, f, g) The net income above operating expenses for 1914 was $65,405.00, which would capitalize at 7% $934,361.00, and for the calendar year of 1913, $1,153,660.92, which would capitalize at 7% $16,523,727.43, and for the calendar year of 1912, $2,084,149.50, which would capitalize at 7% $29,773,564.28. It was shown that no income had ever been paid on the stock of the railroad, except on preferred stock for one year, and that the taxes had increased on the properties from in 1904 $127,304.81 to for 1914 $371,420.22."

545 "Other testimony was offered on said hearing by the plaintiffs and they offered to furnish all information in their possession and requested the Board to make complete and full investigation, which it refused to do."

"The plaintiffs invoke the Constitution of the State of Texas and the laws of Texas against the illegal valuation and assessment, and Sec. 1, of Art. 14, of the Amendments to the Constitution of the United States, in bar of the taxation attacked and the valuation made, and represent that if the court does not intervene, the property will be illegally taken and diverted to the extent of such illegal taxation from its lawful owners, or the persons entitled thereto, and that taxes will be levied and taken without due process of law and in violation of the equal protection of the law."

It is further alleged:

"That if any intangibles existed, which was not admitted, then that they were assessed and taxed at par, or enormously over par, by the State Tax Board's valuation, and that there existed in Harris county a scheme, custom, use and design, participated in by the tax assessors and the defendants, whereby it was agreed, understood, or permitted, that other tangibles in the county, should be assessed as far below the true values, and a large amount of moneys, stock, bonds, loans and choses in action and household furniture, subject to taxation, were understood and agreed not to be taxed at all, and were not taxed, and that it was understood and agreed or permitted that no intangibles, except those of railroads, should be taxed, and that by reason of these facts not less than one-half of the property in the county, subject to taxation, escaped all taxation whatever, and that tangibles were taxed at not over 38% of their true value, or true cash and market value, and that all of these undervaluations and all of these permissions of property to escape from taxation were done systematically by the defendants and the Board of Equal-

ization, and the Tax Assessor, and were intentional and ar-
546 bitrary; whereby it was asserted that the plaintiffs were unjustly, arbitrarily and willfully discriminated against, even if the I. & G. N. Ry. had intangible values, which was not admitted. Wherefore, adhering to the first branch of this case and subject to the same, the plaintiffs claim that if they had any intangibles they must be taxed in Harris county on a basis of the taxation of the property of others in this county, also taking into consideration the failure and refusal of the taxing authorities to value or tax great bodies of property.

"Upon this branch of the case the plaintiffs invoked the Constitution of the State of Texas, and its laws, against such illegal valuations, assessments and discrimination, and Sec. 1, of Art. 14, of the Amendments to the Constitution of the United States, and represented that, if the court did not intervene, the property would be illegally taken and diverted to the extent of the illegal taxation by reason of such discriminations.

"Plaintiffs prayed for a temporary injunction (which was never sued out) and that, upon final trial, the defendants, and their successors, be forever enjoined from collecting the taxes in litigation, and that in the event the court should hold that some parts of the taxes in controversy were due, and not all, then that the amount should be ascertained upon the principles set out above, but this was subject to all of the contentions of the plaintiffs as above made, that there were no taxes due. The plaintiffs prayed for the removal of every cloud or burden resting upon the properties of the railway by reason of these illegal claims, and for general relief."

The defendants answered first by pleas in abatement, setting up procedings instituted by plaintiffs in the District Court of the United States for the Southern District of Texas against the State Tax Board to enjoin said Board from certifying to the various county tax assessors the intangible valuations attacked in this suit, which procedings and the judgment of said court denying plaintiffs' prayer for temporary injunction are pleaded as res adjudicata of the
547 cause of action asserted in this suit. The defendants fruther plead:

"That, in addition to the above and foregoing pleas in abatement, these defendants say that this cause of action should and ought to abate, for the following reasons, to-wit:

(A) Because plaintiffs have an adequate remedy at law, and because there is no threatened injury which will result in irreparable damage to plaintiffs.

(B) Because this suit is, in effect, a suit against the State of Texas, and permission has not been given by the State of Texas to the plaintiffs to file this said suit.

Wherefore, these defendants say that this suit should abate, be dismissed and held for naught."

These pleas are followed by a general demurrer and special exceptions to all of the material allegations of the petition, and by general and special denials of said allegations. The answer further sets out at great length facts showing that the total valuation of the railroad properties is less than the total valuations including intangibles fixed by the State Tax Board and avers that this being true the plaintiffs cannot be heard to complain that intangible values have been assessed even if no such values exist. The following paragraphs of the answer show this contention of defendants:

"By Chapter 4, Title 125, R. S. 1911, it is made the duty of the State Tax Board to diligently inquire into all facts relative to railroad values so as to enable it to determine the true value of such properties, and, from all information which it is able to secure, the Board is charged with the duty of finding 1st: "the entire value of the property (of the Company, etc.)". 2nd: "the true value of the tangible property"; and it is then required to subtract the latter amount from the former "and the residue and remainder of value shall be by said state tax board fixed, determined and declared as the true value of the intangible properties." (Article 7420). As aforesaid, the State Tax Board had the right to rely upon the sworn statements of the Plaintiffs' agents stating the "full
548 and true value" of the tangible properties, and the classification of their properties made thereby, and, if said sworn statements were untrue, and if error was made in the classification and in the amount of value of the tangible properties by reason thereof plaintiffs are now estopped to take advantage of the same, and for such relief defendants pray.

That as aforesaid the "entire value" of plaintiffs' properties is and was far in excess of the sum of $40,000,000.00 as will more specifically be alleged hereinafter. And Defendants, therefore, say:

1st. That the entire properties of the plaintiffs in the State have been assessed for taxation, both upon the tangible and the intangible assets, at much less than 50% of their true values;

2nd. That *there* intangible properties have been assessed by the State Tax Board, and the various County Tax Assessors, at much less than 40% of their real values;

3rd. That the proportion of the sum of their intangible values properly belonging to this county has been assessed at much less than or at least not exceeding, the proportion of value at which other property in the county has been assessed:

4th. That even if a mistake has been made in classifying plaintiffs' properties into "tangible" and "intangibles," and that a larger proportion of the entire values should be regarded as belonging to the "tangibles" still the true "intangibles" properly belonging to this county for taxation purposes have not been assessed at a greater proportion of their value than other property in the county.

5th. That if it be true, which is not admitted, but denied,—that the State Tax Board did not use logical formulas, or methods of cal-

culation, and did not correctly understand the information in their possession and its application, nevertheless the results of their action and calculations are not erron-ous and therefore their mistakes, if any, are immaterial and afford no basis for relief to the plaintiffs.

549 (8) "As aforesaid, defendants say that the total value of all of the properties of the plaintiffs justly subject to taxation within the State exceeds the aggregated assessments thereof by the various County Taxing authorities and the State Tax Board; and in this connection defendants show unto the Court the following:

1st. The total valuation of tangibles and intangibles for taxation is the sum of $24,086,719.00.

2nd. The "Book Cost" of the properties of the plaintiffs up to June 30th, 1914, as shown by their records was the sum of $43,818,-430.79,—representing actual investments,—and since that time a large amount of money, the exact amount of which is to defendants unknown, has been invested therein,—which records are in the possession of the plaintiffs, and they are hereby notified to produce the same upon the hearing hereof."

It is further aver-ed that, in substance, that the total assessment of plaintiffs' property in Harris county, including the intangible values, is less than the assessed valuation for other property in said county and, therefore, plaintiffs show no equity and no right to complain of the taxes which they seek to enjoin. The defendant, Druesdow, filed a cross bill for recovery of the taxes due the county according to the assessment rolls.

Plaintiff, by supplemental petition, excepted to the defendants' answer. The pleas in abatement and all of the demurrers were overruled.

The cause was tried without a jury and judgment rendered in favor of defendants that plaintiffs take nothing by their suit and that the defendant, Druesdow, recover of plaintiffs for the use and benefit of the State of Texas and Harris county, the sum of $6,605.34, and the further sum of $61.27 interest from February 1st, 1916.

The undisputed evidence adduced upon the trial shows that upon a hearing by the State Tax Board on June 18, 1915, after no-
550 tice to plaintiff to appear and show cause why a valuation of the intangible property of the Railway Company theretofore made by the Board should not be made final, the Board after considering plaintiffs' protest and the evidence offered by them, adopted its corrected preliminary valuation fixing the valuation of said intangibles at the sum of $10,743,223 and apportioned and certified said valuation to the various counties in accordance with the provision of the statute.

The amount so apportioned and certified to Harris county was $603,227.00. The state and county taxes assessed in Harris county on said sum amounts to $6,605.34.

At said hearing plaintiffs showed that the valuation of the physical properties of the Railway Company as fixed by the State Railroad Commission some time previous to this hearing was $32,471,027.05,

and that since said valuation was made betterments valued at $1,542,065.00 had been added to the property, making the aggregate valuation of the tangible property of the Railway $34,013,092.07.

The aggregate of the stocks, bonds and lien obligations of every character of the Railway was shown to be $32,154,000.00. It was further shown that the properties now owned by the Railway Company, except some additions which have been since made, were sold out under mortgage foreclosure in 1911 in a suit brought by bondholders of the now defunct International & Great Northern Railway Company and bought in by the present International & Great Northern Railway Company which was organized for the purpose of purchasing and operating the sold out company. By this foreclosure the capital stock of $10,000,000.00 and indebtedness to the amount of $8,000,000.00 of the old company were wiped out. The present company was placed in the hands of receivers on August 10, 1914, for default on its mortgage indebtedness and decree of foreclosure had been entered on May 17, 1915.

The properties were shown to have been well managed for the past fourteen years and the net average income during that time was 4.25% on the Railroad Commission's valuation.

551 The average net income for the year 1912, which was shown to be the best year in the history of the properties, was $2,084,149.50 which capitalized at 7%, the average rate of interest in the section through which the railway operates, would show a valuation of $29,743,564.28. The net income for 1913 at 7% would capitalize $16,523,727.43. The net income for the year 1914 at 7% would capitalize $934,361.00.

All of the facts above stated were shown in the trial in the court below by undisputed evidence. At the hearing before mentioned plaintiffs in writing requested the Board to give the data or information on which it based its findings of the value of the intangible property of the railroad. In response to this request, it furnished the following formula which it had used in ascertaining said value:

"International & Great Northern Ry. Co.

Gross Receipts, 1911	$9,782,165	
1912	11,254,327	
1913	10,902,041	
1914	9,645,785	
Total		$41,584,318
$41,584,318÷4=		10,396,079
Capital stock issued and outstanding...	,822,000	
	26,181,500	
Total capitalization		$31,003,500

$10,396,079÷31,003,500= 33.53 Ratio.
12.50 " T. & P.
33.53÷12.50= 268.24

$4,822,000×268.24	12,934,533	
Mortg. debt at par	26,181,500	
True value		$39,116,033
Physical value (assessed value)		28,372,810
Intangible value		$10,743,233"

The Texas & Pacific Railroad Company ratio used in this formula was obtained by the following formula applied to the earnings, indebtedness and tangible values of that road:

"State Tax Board, Austin, Texas.

"Texas & Pacific Railroad Co.

Gross Receipts, 1911	$11,079,618		
1912	12,341,684		
1913	12,381,305		
1914	11,745,562		
Total			$47,548,169
$47,548,169÷4=			11,887,042
552 Stock issued and outstanding..		$38,763,810	
Bonded Debt:			
1st Mortg. (Par)	$24,992,975		
1st Mortg. "	4,970,000		
2nd Mortg. "	24,987,036		
..	$54,950,011		
Secured Int. accrued	1,498,500		
Total		56,488,511	
		56,488,511	
Total Capitalization			$95,212,321.

$11,887,042÷95,212,321=12.48 Ratio.

38,763,810×12.50 Val. Stk.	4,845,476	
Lien Obligations	56,448,511	
True Value, Texas share—$61,293,987×57.60....		$35,305,336
Physical Value		15,588,147
Intangible Value		$19,717,189."

In both of these formulas it is apparent the decimal point has been misplaced. In the I. & G. N. formula the figures 33.53 should be .3353; 12.50 should be .125, and 268.24 should be 2.6824. In the T. & P. Formula 12.48 should be .1248, and 12.50 should be .125.

The method followed by the Board in ascertaining the amount

of intangible values of the Railway Company for the purpose of taxation and the explanation of the formulas above set out and their use in fixing said values is stated by Mr. Bagby, State Tax Commissioner, as follows:

"That in any mathematical calculation or formula, the two main factors which he had endeavored to find in order to arrive at the value of intangibles were the real value and the physical value of the railroads; that is, the real value of the entire property as a whole, and that he had done this in the case of the I. & G. N. Ry. in connection with its valuation for 1915, and that the valuation found by the Board of $39,999,000.00 plus represented his best judgment as to the true value of the entire properties upon all the information which he had before him, and that the facts showed that that was the proper valuation in the judgment of the Board, and that he was under no coercion from any source in making that valuation, and that it was hard to get anybody to discuss the intangible matters with him, and that the valuation of the property for the I. & G. N. for 1915 took into consideration the mathematical calculation to be used, and that disregarding the mathematical
553 calculation and looking only to the result that the valuation reflects the best judgment of which the witness was capable under all the information he had, and that he saw no conduct upon part of any other members of the Board indicating that they were not exercising their best judgment, and so he would say the same as to every one of the railroads. That the representatives of the I. & G. N. Ry. had appeared before the Board on June 18, 1915, but that these representatives did not offer the Board any facts not disclosed by the records already before the Board. That their representations consisted partly of facts and partly of arguments, with perhaps three witnesses, the auditor, the tax man and the head of the traffic department testified, but what they said did not change the opinion of the Board, and that, as far as he was concerned, he went into the hearing with an open mind and gave a patient hearing, or tried to.

"Cross-examination by the plaintiffs:

"The law says that the intangible assets of a railroad is the difference between its physical value and real value, or, in other words, is the metaphysical value, if any. The witness said that he was a fairly good arithmetician and fairly well knew the "rule of three" and common and decimal fractions. The witness then testified the various formula- which had been introduced in evidence from each railroad emanated from the State Tax Board in 1915, and stated that he, for the most part, made these calculations, based upon a formula of the T. & P. Ry., with the assistance of his associates. That they first got gross receipts of the T. & P. Ry. for four years, divided that by four, then got the total of the capital stock and bonds and found the ratio between the gross receipts and the capital, average gross receipts and the capital stock, and found it to be 12½ or 12.48; that is ⅛. That they then took the capital stock and

multiplied it by 12½ or ⅛; that is, by .125. That it was first found that the T. & P. was the only railroad in the State that had a marketable value for its stock, the Wall Street bulletin showing a
554 quotation on it at either 12½% or 16 cents on the dollar. That then the Board took the capital stock and multiplied it by 12½% and found out what they thought was the real value of the T. & P. and added the bonded indebtedness to this real value of the T. & P. capital stock and took that for the total true value of the railroad and then subtracted the physical value and took the balance for the intangible value.

"Coming now to the I. & G. N. Ry. The witness stated that he found the average gross receipts for four years, then the difference between the bonded indebtedness, and then applied the T. & P. formula and multiplied the difference of its ratio between its capital stock and divided by 12½ (.125). The gross receipts for four years were $41,000,000.00 of the I. & G. N. Ry., divide it by four and it averages $10,000,000.00. The capital stock issued and outstanding is $4,822,000.00 and the mortgage debt at par was $26,069,000.00 in round numbers, or in round numbers about $31,000,000.00 for stocks and bonds. "That, then, they divided the average gross income of $10,369,000 by the $31,000,500.00, and that gave the ratio of the capital stock and gross receipts, and 'we divided, then, the ratio of the capital stock of the I. & G. N. Ry., and gross receipts, by the ratio of the T. & P., 12½'. That would make a ratio of 2.6, and we multiplied the $4,822,000.00 by that and added the mortgage debt at par, then subtracted the physical valuation and found the intangible values of $10,743,000.00."

It is shown from the whole evidence that the alleged intangible values of the Railway Company were found by increasing the par value of its capital stock by the application of the formula and reducing the value of its physical properties below the amount fixed by the State Railroad Commission and shown by the undisputed evidence to be their value and from the sum of the mortgage indebtedness and the value of stock so fixed by the Board deducting the decreased value of the physical properties. Unles- this process can be held sufficient to show that the Railway Company has
555 intangible values upon which the assessment can be based there is no evidence of the existence of said values.

It was shown by the testimony of Mr. Arthur Lefevre, a mathematical expert and teacher of the highest standing and large practical experience, that the formulas used by the board could not possibly show the value of the railway's stock nor in any way aid in ascertaining such value. The T. & P. formula is based upon the theory that the ratio of average gross income to total capitalization has a bearing upon the value of capital stock. It is mathematically certain that since the average gross receipts of a railway company never exceeds its capital, the ratio between the two must always be expressed by a fraction. It follows that when the par or face value of the capital stock is multiplied by this ratio to determine its value the result will show the value of the stock to be less than par. This was the result of the application of the T. & P. formula by which

the value of the stock of that road was shown to 12½% of par. The fortuitous circumstance that at the time this formula was applied for the purpose of ascertaining the value of the stock of that road, the stock was selling on the market at 12½ per cent can not be regarded as showing that the value of railroad stock can be ascertained by multiplying its par value by the fraction representing the ratio of its average gross receipts to its capitalization.

It is manifest that the use of such a formula would, in many cases, greatly and unnecessarily reduce the value of the stock. The Board realized this and applied that formula to no other road.

The use of the T. & P. ratio in the formula applied to the other roads for the purpose of increasing the ratio obtained by the application of such formula is purely arbitrary and could not upon any rational theory demonstrate the value of the stock. Such process must necessarily result in great discrimination in the valuation of the stocks of the different roads, the valuation varying in the
556 proportion to the variation of the ratio of the capital stock to the total capitalization of the various roads. That the application of the formula did produce discrimination between the various roads is shown by the undisputed evidence in this case.

There have been no sales of the stock of the International & Great Northern Railway Company and no market quotation of its value was shown. An expert witness on market value of stocks and securities testified that the stock of a railroad having the capitalization indebtedness and earning capacity of this railway had no market value. Our conclusion of fact from a consideration of all the evidence is that the International & Great Northern Railway Company had no intangible property taxable under the laws of this State when the taxes sought to be enjoined were assessed thereon and the fixing of such values by the State Tax Board was the arbitrary finding of values that did not exist.

Upon these facts appellants are entitled to protection against the collection of the taxes unless such right is defeated upon grounds urged by appellees and which will be hereinafter considered.

Our statute providing for the assessment for taxation of the intangible values of railroad companies is a just and necessary law and its constitutionality has been upheld by the decision of our Supreme Court and the Supreme Court of the United States.

The act provides in substance (Vernon's Sayles' Civ. Statutes Act 7420) that unless the evidence or information adduced before the State Tax Board shall make it appear improper or unjust the Board in fixing the true value of the entire property of the railroad shall take as a basis the aggregate market or true value of all of its shares of stock and add thereto the true or market value of all of its mortgage or lien indebtedness or other charge upon its property or assets and the sum so produced shall be deemed the true value of the entire property. From this sum is to be deducted the true value of all the tangible property of the railroad and the
557 remainder shall be determined and declared to be the true value of the intangible property owned by the railroad.

It then provides for the apportionment of this value of intangible

property to the various counties through which the road operates in the proportion which the mileage of the road in each of the counties respectively bears to the entire mileage in the State.

It will be observed that under this statute the Board is not absolutely required to fix the entire value of the property by adding the value of the capital stock and mortgage indebtedness, but is directed to adopt this method unless from the evidence before it such method should appear improper or unjust.

It can readily be seen that in some cases this method would not be proper and just either to the railroad or the State, and the capitalization of the net earnings of the road at reasonable interest rate would be the proper and just method. In the case of Railway Company vs. Shannon, 100 Tex. 379, our Supreme Court defines the intangible values of a railroad as follows: "The intangible values of a railroad company are the values of the railroad property over and above the value of its physical assets, which intangibles ordinarily result from profits of its business as actually conducted."

This is, we think, a clear and accurate definition and it seems to us that such intangible values can only be shown to exist by one of the methods above stated. But be this as it may, the evidence in this case shows that the Board, in fixing the intangible value of the railway company, took the basis suggested by the statute and unless the value of the capital stock fixed by the Board can be sustained there is no basis for any intangible values. We have found that the so called "Rule of Three" formula applied by the Board to ascertain the value of the stock can not be so applied upon any mathematical principle or rational theory, and its general application produces unjust discrimination between railroads. There is
558 no evidence upon which the value of the stock fixed by the Board can be sustained, and when called upon and urged by the appellants upon the hearing before it to disclose what, if any, evidence or information it had which tended to disprove the showing made by appellants that no such values existed, the Board only offered its "Rule of Three" formula.

Upon the trial in the court below appellees offered testimony showing that the value of the tangible property was much greater than the value at which it was assessed for taxation and greater than the valuation placed thereon by the State Railroad Commission. This testimony does not tend to sustain the intangible valuation found by the State Tax Board. It may be conceded that the addition of value to the physical properties of the road increases the value of the caiptal stock but this fact could have no effect upon the intangible value for the obvious reason that in determining said value by the method authorized by the statute and adopted by the Board the true value of the tangibles must be deducted from the value of the stock and mortgage indebtedness.

This arbitrary action of the Board was doubtless due to the misconception of the scope of the statute creating the Board and of the power conferred upon it by the statute. The pleadings of the defendants and the testimony of the Tax Commissioner show that the Board construed the statute as authorizing it when it deems the

rendition of the physical properties of a railroad for taxation has been made at a valuation less than its fair and just value that it is authorized to add to this value by an "arbitrary" fixing of intangible values of such railroad. It is clear that the statute has no such meaning and cannot be construed as conferring any such power upon the State Tax Board. It has no power to pass upon, correct, or in any way change valuation of tangible property as fixed in the rendition and assessment of such property for taxation. Its right to fix the value of tangible property is only for the purpose stated in the statute of deducting the "true" value of such property from the aggregate value of the stock and mortgage indebtedness,
559 and thus determine the value of the intangible property of the road. Any statute which conferred upon the State Tax Board the power to value and assess tangibles as intangibles and apportion such values among the various counties of the State as provided in this statute would be clearly obnoxious to the provision of the constitution which requires tangible property to be assessed in the county in which it is situated.

Art. 8, Sec. 8-11 and 14, State Constitution, Ry. Co. vs. Shannon 100 Tex. 379. But it matters not what may have been the motive or cause of the illegal action of the Board in arbitrarily fixing values of intangible property that did not in fact, exist, appellant is entitled to relief against the collection of taxes levied upon such illegal assessment.

In the case of Lively vs. Ry. Co. 102 Tex. 559, our Supreme Court says:

"It is not necessary that the officers, in so discriminating, should have intended specifically to injure the appellee or other railroad companies. It is sufficient that by their action they denied the appellee the equal protection of the Constitution and laws of the State. The intent with which the acts were done was of no consequence. Such deliberate action on the part of officers which are charged with the enforcement of the law (i. e. making an assessment) must be held to be the act of the State, and the appellee was entitled to relief against the enforcement of the excessive assessment."

In the case of Cummings vs. Bank, 11 Otto, 153, the Supreme Court of the United States in considering a case involving inequality in assessing values says:

"Independently of this statute, however, we are of the opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution and when this rule is applied not solely to one individual, but to a large class of individuals, or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

560 The word "designed" as here used is not used as a synonym of "intended" but rather in the sense of calculated;

"In Railroad & Telephone Companies v. Board, 85 Fed. 305, it was said:

'It is conceded and could not be controverted that the bill contains no specific allegation of fraud on the part of the Board of Equalization. While I do not regard this as a controlling point at all in the case, it must be stated, to avoid misapprehension, that although acting with perfect honesty, if the assessors or Board of Equalizers pursued methods calculated to bring about a substantial inequality in the value of the properties here in question, as compared with other species of property in the State, the innocent intent in such a procedure would be no legal justification whatever in law for a wrong result. Full legal responsibility is recognized for the necessary, legitimate and natural result of acts, and a systematic course of procedure, and an innocent mistake about the matter does not change the effect. For legal purposes, all persons are presumed conclusively to contemplate and intend the necessary and natural result of their acts. (Agnew v. U. S. 165-36.) If the Board of Equalization was under a duty to equalize, a mistaken view that such was not its duty could not change the law, and could not render a result legal which would otherwise be illegal.' In German National Bank v. Kimball, Collector, et al., 13 Otto, 732, S. C. of U. S. and 26 L. E. 469.

The court says: 'It is held in these cases that when the inequality of valuation is the result of a statute of a State designed (i. e. the necessary operation of which is) to discriminate injuriously against any class of persons *of* species of property, a court of equity will give proper relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessment combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief.' "

In addition to the above authorities appellants' right to relief is sustained by the following cases:

Galveston County vs. Galveston Gas Co., 72 Tex. 517; Johnson vs. Holland, 43 S. W. 71; State Board of Equalization vs. People, 61 N. E. 339, 191 Ill. 528.

The first contention of appellees in reply to appellants' brief is as follows:

"Since the State Tax Board, and no other official or body, representing the State of Texas as a whole is not a party to the litigation; since the State Tax Board has long since performed all of the duties laid upon it by law, and has certified the results of its valuations to the various counties, and had done so long before the filing of
561 this suit; and since it was the duty of the appellants to enjoin said Board from certifying said valuations before it did so, if there was error therein so that such error could be corrected; and since appellants attempted in the Federal Courts to secure such injunction and abandoned the attempt; and since the result of a successful attack upon such valuation in this suit to which only the

taxing authorities of Harris County are parties defendant would nullify the valuations certified by the State Tax Board to some thirty-six other counties and thus deprive each and all of such counties of such taxable values and also deprive the State of the whole of such taxable values, there is a fatal defect of parties, and the appellants are concluded from making such attack in this case."

There is no merit in this contention.

Appellants were, in our opinion, entitled to an injunction restraining the Board from certifying the intangible values found by it to the various counties because, as we have before concluded, the finding of such values was without any evidence to support it and was purely arbitrary. The record shows that they attempted to pursue this remedy by a suit filed in the Federal District Court but upon a denial by the judge of that court of their application for temporary injunction they dismissed their suit.

The order of the judge on a preliminary hearing refusing a temporary injunction is not res adjudicata of appellants' cause of action and the trial court properly so held. The Board having certified its findings to the various counties, no suit against it to enjoin such certification could have been brought when this suit was instituted, and it was not a necessary party to a suit to enjoin the collection of taxes levied on an illegal and void assessment made by it.—Ry. Co. vs. Shannon, 100 Tex. 388; Chicago Union Traction Co. vs. Board, 114 Fed. 557; Raymond vs. Chicago Union Traction Co. 207 U. S. 20; Pelton v. Bank, 11 Otto, 143.

The trial court found, and there is evidence to sustain the finding, that taking the Railroad Commission's valuation of the
562 physical properties of the railway in Harris County as a basis the total value of the property assessed against the railway in Harris County, including the intangible values, did not amount to a greater per cent of the true value of the tangible property of the railway than the percent at which other tangible property in said county was assessed for taxation. Upon this ground the court held that the plaintiffs showed no equity and were therefore not entitled to relief against the collection of taxes upon intangible values, regardless of whether such intangibles existed. We do not think this holding is sound. The valuation of the tangible property of the road in Harris County was fixed by the officers of the county charged by law with that duty and if they fixed such taxable valuation at a less per cent than the value at which the property of the citizens generally in said county was assessed for taxation this mistake can not entitle the county to collect taxes upon property which the company does not own and which, in fact, has no existence.

Appellants' contention that our present intangible tax law is unconstitutional by reason of an amendement to the statute enacted by the legislature in 1907 after the decision of our Supreme Court upholding the constitutionality of the intangible tax statute of 1905, cannot be sustained. The section of the original act and the amend-

ment thereof which appellants claim renders the law unconstitutional are as follows:

Act of 1905.

"And every individual and association of individuals doing such business shall, in addition to the ad valorem taxes on tangible properties which are now imposed upon them by law annually, beginning with the first day of January, 1906, pay a tax to the State for the year 1906, and for each year thereafter, on their unrendered intangible assets and property, and local taxes thereon, to the counties in which its business is or shall hereafter be carried on, which additional tax shall be assessed and levied upon such assets and property in the manner hereinafter provided."

Act of 1907.

"Every incorporated railroad, ferry, bridge, turnpike or toll company, and every other individual company, corporation or association doing business of the same character, in this State, in addition to the ad valorem taxes on intangible properties which are or may be imposed upon them respectively by law, shall pay an annual tax to the State, beginning with the first day of January of each year, on their intangible assets and property, and local taxes thereon, to the counties in which its business is carried on; which additional tax shall be assessed and levied upon such intangible assets and property in the manner provided in this chapter."

563 Appellants claim that the amendment renders the law unconstitutional because it authorizes the levy of taxes on intangible property in addition to the ad valorem taxes on intangible properties which are or may be imposed by law, and thereby authorizes a double assessment of intangible properties. We do not think this is a proper construction of the amended statute. When the statute is considered as whole we think it clear that the word "intangible" where it first appears in the section of the amendment above quoted was so written by clerical mistake and that it was the manifest intention of the legislature to there use the word "tangible," and therefore the amendment does not authorize a double assessment of intangible properties.

As before stated, we are of the opinion that the appellants upon the uncontradicted evidence were entitled to be relieved from the payment of taxes levied upon an arbitrary valuation of intangibles which had no existence, in fact, and the trial court should have granted an injunction restraining the collection of said taxes.

It follows from this conclusion that the judgment of the trial court should be reversed and judgment here rendered, granting such injunction, and it is so ordered.

Reversed and Rendered.

R. A. PLEASANTS,
Chief Justice.

Endorsed: In Court of Civil Appeals, Galveston. James A. Baker & Cecil A. Lyon, Receivers, Appellant, vs. Karl L. Druesedow et al., Appellee. Opinion. Pleasants, Chief Justice. Recorded September 29, 1917. Filed in Court Civil Appeals Jun- 28, 1917. H. L. Garrett, Clerk. Filed in Supreme Court Nov. 8, 1917. F. T. Connerly, Clerk. With App. No. 10577.

564 *Judgment.*

June 21st, 1917.

No. 7339.

JAS. A. BAKER et al., Appellant-,

vs.

KARL L. DRUESEDOW, Tax Collector, &c., et al., Appellee-.

From Harris County.

Judgment.

"This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be reversed, and this court proceeding to rendered such judgment as should have been rendered by the court below, it is ordered, adjudged and decreed that James A. Baker and Cecil A. Lyon, Receivers of International and Great Northern Railway Company, and the International & Great Northern Railway Company, and each of them and all persons entitled under or after them be now decreed to have an injunction against the defendants, Karl L. Druesedow, Tax Collector of Harris County, Texas, W. H. Ward, County Judge of Harris County, Texas, W. H. Lloyd, J. A. Smith, W. H. Kiser and D. Barker, County Commissioners of Harris County, Texas, against each of them and against the last five constituting the Commissioners Court and Board of Equalization of Harris county, Texas, and against their successors, employees and attorneys and any person holding under or claiming under, by or through them, forever prohibiting them from asserting any claim to the $6,667.10 taxes herein in litigation, and attempting to collect the same, and for which injunction let the plaintiffs and each of them and their successor or successors have their writ or writs.

"It is further ordered that the appellees, Karl L. Druesedow, Tax Collector of Harris county, Texas, W. H. Ward, County Judge of Harris County, Texas, W. H. Lloyd, J. A. Smith, W. H. Kiser and D. Barker, County Commissioners of Harris County, Texas, pay all costs in this cause incurred, both in this court and in the court below; that the officers of court recover of each party respectively
565 & 566 all costs by them herein incurred, and this decision be certified below for observance."

Motion for Rehearing.

Filed in Court of Civil Appeals Jul. 12, 1917. H. L. Garrett, Clerk.

In the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, Texas.

No. 7339.

JAMES A. BAKER, Receiver et al., Appellants,

vs.

KARL L. DRUESEDOW et al., Appellees.

Appellees' Motion for Rehearing.

To said Honorable Court:

Come now appellees in the above styled and numbered cause, and file this their Motion for Rehearing therein, and pray that the judgment entered therein heretofore on the 21st day of June, 1917, (the findings of fact and conclusions of law therein being filed on June 28th, 1917), be set aside and held for naught; that they be granted a Rehearing in said cause; and that, thereupon, the judgment of the District Court of Harris county, Texas, be in all things affirmed. The grounds of said motions and prayers being the following, to-wit:

I.

The Court of Civil Appeals erred in holding and deciding that the appellants (and the I. & G. N. Railway Company), at the time of the making of the valuation of their Intangible Assets by the State Tax Board for the year 1915, had no property subject to such valuation or subject to taxation under the law under which said Tax Board operated, and in holding that the evidence in this case shows such to be the fact, and in reversing the judgment of the trial court and rendering judgment for appellants by reason of such holdings.

567

Statement.

Articles 7515, 7518 and 7520, Revised Statutes 1911, require railway companies to list "all their real and personal property" in the counties where situated "at the full and true value"; Article 7517 requires this "listing" to be sworn to. Pursuant to these statutes appellants listed, under oath, their physical properties (exclusive of rolling stock) in all the counties in which they operated at a total valuation of "about $14,000,000" as its "full and true value." (Statement of Facts, page 165.)

Article 7525 requires appellants, under oath, to list their entire

rolling stock at the "true and full value" thereof; pursuant to this statute the rolling stock was so listed as having a value of $2,168,906.00. (Statement of Facts, page 165.)

The above valuations were testified to by Mr. Holder, Land & Tax Agent for appellants. (S. F. page 165.) We have here, then, a sworn valuation of purely "tangible properties" by appellants themselves (who, neecssarily, were in the best position of anybody to classify their entire properties as between "tangibles" and "intangibles"), aggregating $16,168,906. And of this valuation of "tangibles" the members of the State Tax Board knew.

Now, the appellants were required by the statute each year to make a sworn report to the State Tax Board showing, among other things, "the true value of all the tangible property owned by such company in each of the counties of the State." These reports were made for each year since 1907, and the report for the year ending December 31, 1914, showed such value of the "tangible properties" to be the aggregate sum of $26,026,810.78 (Statement of Facts, page 88) exclusive of rolling stock which was rendered at $2,168,906.00 (Statement of Facts, page 169),—a total valuation of "tangibles" of $28,195,716.78. The State Tax Board took the sum of $28,372,810.00 as the value of the tangibles (Statement of Facts, page 17), thus exceeding appellants' valuation of this class of property by the
568 sum of $204,904. This necessarily decreased the valuation of intangibles by a like amount. Appellants filed another affidavit with the Board showing the value of their physical properties, including rolling stock, to be the sum of $28,000,000.00. (Statement of Facts, page 350). Mr. Bagby, Chairman of the Board, testified that the Board took these figures reported and sworn to by appellants as the basis of the Board's finding of the value of the "physical properties." (Statement of Facts, page 350.) That these figures were reported, under oath, to the Board as the true value of the physical properties, is nowhere contradicted. The report itself is in the record at pages 82 to 95 of the Statement of Facts, sworn to by Mr. W. J. Werner, Auditor for Appellants.

This report also showed that the total value "assessed" in all the counties, exclusive of rolling stock, was the sum of $27,966,444. (Statement of Facts, page 88). But this sum included the assessments on the valuation of Intangibles as made for the year of 1914. (Statement of Facts, pages 164-65). The valuation made by the Tax Board for 1914, and included in the sum just mentioned, was approximately $14,000,000. (Statement of Facts, page 165). And this the Board knew. (Statement of Facts, pages 164-65). The value of "rolling stock" assessed for all the counties, as shown by the report, was $2,346,992. (Statement of Facts, page 89). So that the "assessed value" of all physicals for 1914 was approximately $16,000,000.

The only other factor to be considered by the Board was the "entire value of the property" of appellants. The minimum "entire value" for the property shown by the record is the sum of $32,471,027.05 (the valuation of the Railroad Commission of Texas), plus

$1,542,065.02 additions and betterments made since said valuation by the Railroad Commission, or an aggregate minimum value of $34,013,092.07; this is alleged in the petition of appellants, as shown by the opinion filed in this case, and there is not a scintilla of evidence in the record to show that the value of the "entire property" is less than these figures.

569 The par value of all lien indebtedness of appellants and the Railway Company, as shown in the petition, and in the opinion of the Court of Civil Appeals, was $27,332,000; this included Receivers' certificates to the amount of $600,000. (Statement of Facts, page 98.) The non-lien indebtedness (minus the $600,000 Receivers' certificates just mentioned) was $3,340,867. (Statement of Facts, pages 97-98). The total indebtedness was, therefore, $30,672,867.00. The indebtedness (secured and unsecured) deducted from the minimum value shown for the "entire properties" ($34,013,092.07) leaves $3,340,225.07. This remainder certainly represents the minimum value of the stock.

The Railroad Commission includes in its final valuations 6 per cent of the physical values found as a "franchise value." (Statement of Facts, pages 42, 373). The Appellants, before the Tax Board, expressly refused to admit the correctness of the valuations made by the Railroad Commission. (Statement of Facts, pages 43-44).

The State Tax Board found the "entire value" of all the properties of appellants to be the sum of $39,116,033.00. (Statement of Facts, page 17). Appellants nowhere in their petition or in the evidence have denied that the total value of all their properties was less than this figure. Of course, they say that the Intangible value and the value of the stock is excessive, but no denial can be found of the proposition that their whole properties were worth less than the amount found by the State Tax Board. But there is ample evidence to show that their entire properties were worth at least $39,116,033.00. And as to this we call attention to the following facts,—shown in large part by the records of appellants,—and nowhere contradicted:

The actual money investment in "road and equipment" up to June 30th, 1915, was the sum of $46,502,041.55. (Statement of Facts, page 130). Of course, some elements of the property in which this investment was made from time to time were subject to depreciation; but other elements were at the same time subject to appreciation,—for instance the value of a road-bed in-

570 creases with use and time, the value of this appreciation (called "seasoning") is estimated by Mr. Freeman for the I. & G. N. at *at* least $1,000,000.00. (Tr., pages 64-65). These elements of "appreciation" are not set up in the books of the appellants, but all "depreciation" is so taken account of, and, after allowing for "depreciation" the balance sheet of appellants states the value of "road and equipment" to be $37,243,133.44 as of June 30th, 1914. (Statement of Facts, page 243). These figures are not only carried on the books of the Company, but they were reported under oath to the Railroad Commission of Texas and to the Interstate Com-

merce Commission. Appellants have not challenged the correctness of the figures. If the total lien and non-lien indebtedness be subtracted from this amount it leaves $6,570,266.44. If the figure (28,372,810 dollars) used by the Board as the value of the tangible properties be deducted from this sworn statement of value by appellants, it leaves $8,870,323.44.

Mr. T. J. Freeman, who has been connected with these properties for a great many years, expressed the opinion that they are worth in excess of $40,000,000.00, and gives good reasons for his opinion. (Statement of facts, pages 247-249; Tr., pages 64-67). The reasons for this opinion are set out at length on pages 9 to 14 of appellees' brief. A good many elements of property considered by Mr. Freemen are clearly "going concern values," and in practically every important particular he is corroborated by appellants themselves.

For instance: Mr. Freeman estimates the value of the trackage right, etc., arrangement with the G. H. & H. as worth at least $1,000,000. Appellants stated that it "is material to the interests" of the I. & G. N. "that the terms and provisions of these contracts be kept and maintained" and that "it would be disastrous to the property to have these contracts annulled. (Statement of Facts, pages 251-252). Mr. Freeman estimated the value of the "seasoning" of the I. & G. N. at the minimum of $1,000,000.00. That such a value exists is admitted by Mr. Fay, General Manager for appellants, and a witness for them in this case. (Statement of Facts, pages
571 161-162). Mr Freeman estimates that the Magnolia Park Railway (a part of the Houston Terminals of the I. & G. N.) is worth at least $1,000,000 more than the amount paid for it and accounted for in the $37,243,133.44 mentioned above. That these and other terminals have a value as a part of a going concern, and a value which cannot be localized, was admitted by Mr. Fay in this case (Statement of Facts, page 160), and *by* Mr. Booth, Traffic Manager, admitted the same thing in effect. (Statement of Facts, page 147). Mr. Booth also testified that the I. & G. N. "has valuable franchises" in the city of Houston "worth a great deal from a traffic standpoint" which "added something to the value of the properties as a whole." (Statement of Facts, page 150).

Mr. Fay testified that "as to express, the railroad incurs no expense outside of the equipment, the handling is done by the express companies." (Statement of Facts, page 161). The same, manifestly, is true as to the "mail"; the appellants received $245,373.74 from mail service and $181,999.98 from express service for the year ending June 30, 1915, and similar amounts for each year. (Statement of Facts, pages 149, 252).

That the stock of the I. & G. N. Ry. Co. has a value of $5,078,000.00 in excess of par according to the judgment of its owners is conclusively established in this case. This additional value is represented by an Interim Certificate for that amount issued by the I. & G. N. Ry. Co. to the International & Great Northern Corporation, which corporation is also the principle stockholder of the I. & G. N.

The reason for the issuance of this certificate is briefly this: When

the properties of the old I. & G. N. Ry. Co. were sold out in 1911, the purchasers thought that they were worth in excess of $36,000,000.00, and provided for the chartering of the present I. & G. N. Ry. Co., with an authorized capital stock of $11,500,000.00. (Statement of Facts, page 259). When it was found that the Railroad
572 Commission would not authorize the issuance of all the stock and bonds contemplated, stock was actually issued to the amount of $4,822,000.00, and the interim certificate was issued for the par value of $5,078,000.00 to cover excess of value over the Commission's valuation, and to be taken up in regular stock when the same might be lawfully issued. This item of $5,078,000.00 is carried as a liability upon the books of the railway company. (Statement of Facts, page 133.) It is found in the "comparative general balance sheet" on page 242 of the Statement of Facts as "other deferred credit items." As to it, W. J. Werner, Auditor for the Company, testified as follows:

"The witness stated that the interim certificates appeared in the statement in the deferred credit items; that is, in the statement of the figures introduced. This means a liability. The face amount of the Interim Certificates was $5,078,000.00. The item appears somewhat larger as containing other elements. Interim Certificates are carried as stock is carried, and, if added to preferred and common stock, would make the sum of $9,900,000.00. The authorized capital stock under the charter is $11,000,000.00, and under the plans of the Company common stock is reserved to be exchanged for the Interim Certificates, as the Railroad Commission may increase its valuation to that extent. The $1,600,000.00 of bonds referred to above is exchangeable for preferred stock, and it added to the Interim Certificates and other stock, would make the amount of $11,000,000.00, but the Company has not been capitalized up to that amount, according to the witness' books." (Statement of Facts, page 133.)

With respect to the reasons for the issuance of the certificate and the value behind it, the International & Great Northern Corporation stated:

"The outstanding capital stock would be $5,000,000.00 of preferred stock, and $6,500,000.00 of common stock, making a total of $35,139,000.00 of capitalization upon a property which then had actual indebtedness prior to the sale in excess of $36,000,000.00, and had demonstrated by its earnings, in operation by the re-
573 ceiver, a value in excess of that amount." (Statement of Facts, p. 259.)

"On the question, as to the consideration moving to the Company, we submit that the record in this case fully discloses an adequate consideration within the meaning of the law as defined and construed by the Texas courts." (Statement of Facts, page 267.)

"Without going further into an analysis of these features of the reorganization plan, which are set forth at length in the Statement of Facts herein, it is respectfully submitted that in consideration

given by the Reorganization Committee to the new company, for its securities, including the proposed issue of $6,500,000.00 of common stock, a part of which is now represented by the conditional Interim Certificates, was not only a valuable and adequate consideration for all the securities, including the conditional Interim Certificates, but exceeded in actual present value the par value of such securities."

In other words, if the Company could have issued all of its common stock at the time, it would have been supported by an abundant and valuable consideration as between the stockholders and the company, to meet the provisions of the Texas law, as construed by the highest courts of that State.

"That even if we consider the question of consideration as being now before us, yet the consideration given to the Company by the Reorganization Committee under the plan of reorganization was adequate and abundant as between the company and its stockholders to sustain the issue of the entire $6,500,000.00 of stock provided by the Articles of Incorporation in accordance with the laws of Texas, as con-trued by its highest courts.

"That the Company having received from the Reorganization Committee this consideration, having a present actual value in property and cash adequate to sustain the issue of all the common stock authorized by its Articles of Incorporation including that represented by the conditional Interim Certificates." (Statement of Facts, pages 267-269.)

574 II.

The Court of Civil Appeals erred in making the following finding of fact, to wit:

"Our conclusion of fact from a consideration of all the evidence is that the International & Great Northern Railway Company had no intangible property taxable under the laws of this State when the taxes sought to be enjoined were assessed thereon and the fixing of such values by the State Tax Board was the arbitrary finding of values that did not exist."

Statement.

The Statement made under the First Assignment of Error is here referred to and adopted as a statement under the second assignment.

Authorities.

III.

The evidence in this cause shows that appellants had property subject to valuation by the State Tax Board of amount at least equal to the valuation thereof made by said Board for the year in question.

Statement.

The statement under the first assignment of error is here referred to and adopted.

IV.

The evidence having shown that appellants (and said Railway Company) had at least some property, and substantial property, subject to valuation by the State Tax Board for the year in question, the Court of Civil Appeals was without power, in this case, to set aside valuation in whole even though the evidence may have shown such valuation to be excessive.

Statement.

Same as under first assignment.

V.

The Court of Civil Appeals erred in the following conclusion in its opinion (on page 15 thereof), to wit:

"It is shown from the whole evidence that the alleged values of the railway company were found by increasing the par value
575 of its capital stock by the application of the formula and reducing the value of its physical properties below the amount fixed by the State Railroad Commission and show by the undisputed evidence to be their fair value and from the sum of the mortgage indebtedness and the value of the stock so fixed by the Board deducting the decreased value of the physical properties."

Statement.

The statement under the first assignment is here referred to and adopted as a part of the statement under this, the fifth assignment of error.

In addition to such statement the record shows that the "formulæ" were used, if used at all by the Board, as to the "preliminary valuation"; that upon the "final hearing," and preliminary to the final valuation, all evidence was heard and considered by the Board upon the question of the correctness of the valuation of "tangibles" and the valuation of the "entire properties" irrespective of the "formulæ"; and that the mathematical or theoretical errors, if any, in the "formulæ" did not affect the final results and valuations.

In the first place, the formulæ introduced in evidence were simply private memoranda made by Mr. Bagby in an effort to give the interested railways a mathematical explanation of how the results shown in the preliminary estimates might be reached (Statement of Facts, page 348). These formulæ were thus given as to the preliminary estimates, and before the hearings before the Board (State-

ment of Facts, page 348). At the hearing on the final valuation (which is the one involved in this case) all representatives of the railroads appeared and the Board heard all evidence and argument submitted by them, and any and all reasons they had to offer why the results of the preliminary valuation should not be made final. That the Board heard and considered all evidence offered, and all facts shown by the reports before it, and all argument advanced, is not denied; that it thereupon considered the question as to the correctness of its valuation of the tangible properties and its
576 valuation of the entire properties independent of the formulæ, is affirmatively and without conflict shown in the evidence: Mr. Bagby testified that the Board "took into consideration the evidence that was offered at its final hearing" (S. F. p. 349). He positively stated that the Board was not guided alone by the formulæ. Counsel for appellants asked the following question,—"Q. You were guided by this formula and the things expressed in the formula, and the fact that the railway was a going concern?" to which he answered: "A. This and other matters." (Statement of Facts, pages 349-350.) At another place counsel for appellants asked Bagby to "state what documents he had, or what were considered, and what data was considered, outside of the formula and outside of the fact that the I. & G. N. was a going concern," and he said that the Board "had the I. & G. N. reports, and different letters, the Railway Commission Reports, and different tax reports, and different data that the former Tax Commissioner had left in his office. That he had a general knowledge of the Railway Company as a whole; that they (the Board) took into consideration the fact that the Railway was in the hands of receivers, and reduced the intangible assessment for 1914 (by) $3,500,000.00; that he had acquired this information from any source that he could—that the Board had investigated generally, not only the I. & G. N. but the other railroads, and there was no discrimination on the part of the Board as to the I. & G. N. Railway—that he as a member of the Board tried to find out every item as to the Railway Company." (Statement of Facts, page 352.) He said "that his best judgment was that the I. & G. N. was worth $39,000,000 plus." (Statement of Facts, page 354.) He also testified as follows:

"That each of the railroads filed their reports in forms similar to those of the I. & G. N. and the T. & P. had done so for five or six years back; that the Board considered these reports and the information in them, at least that he, the witness did, and that he considered the I. & G. N. reports and former valuations made by the Board of all railroads, and got information from any source
577 where he could find it, and considered all the evidence and argument offered by counsel for the railroads, and their witnesses, and that the final valuation in each instance reflects the witness's honest judgment as to what the evidence showed the values to be, and that he had no ground to suppose that it did not reflect the honest judgment of the other members of the Board; that after hearing the evidence and those statements, the Board decided, in

their best judgment, that some of them should be reduced, and that the witness concurred in such decisions, because of the effect of the evidence on his mind; that he understood the law required him to consider the evidence; that he did so to the best of his knowledge and ability; that the Board applied the formula, and if it resulted in what they thought, in their best judgment was correct, they let is stand; that if the Board decided, after the evidence was in, that the formula did not reflect what one would call the best judgment of the Board, then the Board changed it." (Pages 364-365, Statement of Facts.) "That the different railroads make reports to the State Tax Board, and that the Board gathered all the information it could from all sources, and at times examined the reports filed with the State Railroad Commission and other public records bearing on the subject, and read all the text books on the subject which they could get." (Page 342, Statement of Facts.) "That he had acted in good faith, and tried to get all the information he could as to what the intangible assets of the railways were, and had tried to study the statute. That in any mathematical calculation or formula, the two main factors which he had endeavored to find in order to arrive at the value of intangibles, were the real value and the physical value of the railroads, that is, the real value of the entire property as a whole, and that he had done this in the case of the I. & G. N. Railway in connection with its valuation for 1915, and that the valuation found by the Board of $39,000,000.00 plus represented his best judgment as to the true value of the entire properties upon all the information which he had before him, and that the facts showed that that was the proper valuation in the judgment of the court (Board), and that he was under no cœrcion from
578 any source in making that valuation, * * * that the valuation reflects the best judgment of which the witness was capable under all the information he had, and that he saw no conduct upon the part of any other member of the Board indicating that they were not exercising their best judgment, * * * that their representations consisted partly of facts and partly of arguments, with perhaps three witnesses, the Auditor, the Tax man and the Head of the Traffic Department testified, but what they said did not change the opinion of the Board, and that as far as he was concerned, he went into the hearing with an open mind, and gave a patient hearing." Pages 343, 344, Statement of Facts.) "That these were supposed to be private memoranda and not public property, and that he did not remember, under the circumstances, and that all of these formulas were private papers, * * * all of these formulas introduced into evidence were just private memoranda." (Pages 348, 349, Statement of Facts.)

If it were conceded that there were mathematical or theoretical errors in the formulæ, the evidence set out above would clearly indicate that such errors were not harmful to appellants. As shown, these formulæ were given out before the final hearing; the appellants and others were given notice to appear and show why the results, to-wit: the valuation of the tangibles, the valuation of the entire properties, as made in the preliminary estimates were not

correct; when the final hearing came on, these results (no matter how arrived at) were the things considered, and as to these results the Board heard and considered all evidence and information in its possession, and thereupon allowed the results to stand in cases where it thought they were correct (after a consideration of all evidence and argument) and in cases where it thought the results to be incorrect (after considering the evidence), it changed the preliminary estimates.

That the supposed use of the formulæ in the cases of different roads worked no injustice to the I. & G. N. is made clear by the record: In practically every case the other roads were valued
579 finally much higher per mile than the I. & G. N. The I. & G. N., with a mileage of 1,106 miles (S. F. page 270), was valued by the Board at $10,743,223, or at $9,713 per mile. Below is shown the mileage, the (intangible) valuation as made by the Board, and the valuation per mile for the roads which, according to appellants, present the worst cases of discrimination against the I. & G. N. (the mileage used is that shown on pages 291-2, and the valuations are those shown on page 270, of the Statement of Facts):

Road.	Mileage.	Valuation.	Valuation per mile.
Texas & Pacific	1,038	$19,717,189	$19,000
G. H. & S. A	1,331	25,629,200	19,255
Ft. W. & D. C	454	9,764,010	21,066
G. C. & S. F	1,145	22,565,622	19,708
H. & T. C	828	12,989,008	15,687
M. K. & T	1,119	20,144,490	18,000

In nearly every instance the other roads were valued by the Board at almost twice as much per mile as the I. & G. N.

Again: The Board reduced the valuation of the I. & G. N. under the previous year by the sum of $4,745,377; whereas it reduced some of the other roads' valuations by a very small sum, and in most instances increased the valuations.

The valuations of the roads named above for the two years were as follows:

Road.	Valuation, 1914.	Valuation, 1915.
I. & G. N	$14,488,600	$10,743,223
Texas & Pacific	20,117,955	19,717,189
G. H. & S. A	25,297,360	25,629,200
Ft. W. & D. C	9,991,080	9,764,010
G. C. & S. F	19,469,592	22,565,622
H. & T. C	12,400,650	12,989,008
M. K. & T	19,629,750	20,144,490

(See Statement of Facts, page 270.)

There is absolutely no evidence in the record by which the court can determine whether or not the valuations for any of the other

roads were incorrect, too high or too low, or by which it can determine whether or not, as a matter of fact, the valuations of the I. & G. N. were not in its favor as compared with any or all of the other roads valued. But since the valuations of all are at least
580 prima facie correct, it would appear that the I. & G. N. has no complaint as between it and the other roads.

VI.

The trial court, upon sufficient evidence, having found the following, to-wit:

"I find that the State Tax Board in making the valuation of Railroad Intangible properties for the year 1915 considered all evidence and information before it, and that in making the valuations complained of in this case, acted in good faith and no sufficient evidence has been offered to show that their valuations were brought about, or affected, by fraud, bad faith, or other improper influences, and the evidence shows that such valuations reflect their best and honest judgment as to what the valuations should be,"

and

"The evidence is insufficient to impeach the valuations made by the State Tax Board and complained of in this case, and the relief prayed by reason of the allegations in Subdivisions I and II of the Petition should be denied,"

the Court of Civil Appeals erred in overruling and reversing such findings and the judgment based thereon.

Statement.

The statement made under the first and fifth assignments of error are here referred to and adopted.

Authorities.

(1) As to effect of trial court's findings:

(2) Insufficiency of evidence in general to impeach valuations:

VII.

The Court of Civil Appeals erred in finding that "there is no evidence upon which the value of the stock fixed by the Board can be sustained" and that such value was fixed by the use of the "formula" in question, whereas there was ample evidence to support such finding of value by the Board, and such finding of value was not arrived at by the use of the "formula", but was arrived at from a
581 consideration of all the evidence before the Board, the supposed use of the "formula" being merely incidental and producing no error in the result.

Statement.

Same as under first and fifth assignments.

VIII.

The Court of Civil Appeals erred in those portions of its opinion and conclusions wherein it is said:

"At the hearing before mentioned plaintiffs in writing requested the Board to give the date or information on which it based its findings of the value of the intangible property of the railroad. In response to this request, it furnished the following formula which it had used in assertaining said value:

'International & Great Northern Ry. Co.

Gross Receipts, 1911	$9,782,165	
1912	11,254,327	
1913	10,902,041	
1914	9,645,785	
Total		$41,584,318
$41,584,318 ÷ 4 =		10,396,079
Capital stock issued and outstanding	$4,822,000	
	26,181,500	
Total Capitalization		$31,003,500
$10,396,079 ÷ 31,003,500 =	33.53 Ratio.	
	12.50 " T. & P.	
33.53 ÷ 12.50 =	268.24	
$4,822,000 × 268.24	12,934,533	
Mortg. debt at par	26,181,500	
True value		$39,116,033
Physical value (assessed value)		28,372,810
Intangible value		$10,743,233'"

"There is no evidence upon which the value of the stock fixed by the Board can be sustained, and when called upon and urged by the appellants upon the hearing before it to disclose what, if any, evidence or information it had which tended to disprove the showing made by appellants that no such values existed, the Board only offered its "Rule of Three" formula."—because the evidence without conflict shows that the Board at the final hearings considered all evidence and argument before it, and that from such evidence and information, regardless of the formula, it exercised its best judgment and thereby concluded that the tangible properties were worth $28,

372,810, and that the entire properties were worth $39,116,033; and because the evidence further shows that the Board when
582 "called upon for an explanation" showed that it had considered all evidence and information before it.

Statement.

Same as under the first and fifth assignments.

IX.

The Court of Civil Appeals erred in holding that values subject to valuation by the State Tax Board can only be shown to exist by one of two methods, namely (1) By adding the values of the capital stock and the mortgage indebtedness to find the "entire value" of the property and by deducting therefrom the value of the physical property; or (2) By capitalizing the net earnings of the carrier at a reasonable rate of interest, whereas the statute permits the Board to adopt any method which all the information before it may show to be just.

Argument under Foregoing Assignments of Error.

Pretermitting discussion as to the power of the Court to overturn the valuation made by the Board because of lack of necessary parties and deferring, also, discussion as to the "formulæ" and its use, we first assert the proposition that there is ample evidence to support the finding of $28,373,810 as the value of the physical properties, and to support the finding of $39,116,033 as the value of the "entire" properties of appellants. Sequentially, we say, there can be no error in the final result obtained by subtracting the smaller figure from the larger and denominating the result as the value of the "intangible properties." If the major premise is correct, the accuracy of the deduction cannot be challenged. For the statute plainly requires the Board to find the value of the physicals and the value of the entire property and to deduct the one from the other, "and" says the statute, "the residue and remainder of value (thus obtained) shall be by said tax board fixed, determined and declared as the true value of the intangible properties."

583 First, as to the Valuation of the "Tangibles."

A railway company owns an operated railway. It is a going concern. As such,—unless in very exceptional cases,—it has a value which cannot be localized as to any particular parcel of the whole. Between the intrinsic worth of the right-of-way, road, bed, steel, ties, locomotives, cars, etc., as separate units and the entire value of the enterprise as a whole there is a twilight zone, a value which cannot accurately be segregated and ascribed to any particular piece or element of the whole. As said in Fargo vs. Hart, 193 U. S. 499:

"When * * * property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the State * * * The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole."

See also, Ry. Co. v. Bachus, 154 U. S. 421.

Every tie, every yard of rail, every station building in Anderson county has a value over and above the commerical value of the individual tie, etc. because of their organic relation to the ties, steel buildings, etc. in Harris county and in every other county, and because the whole,—in its "organic unity" constitutes the means of carrying on a great business yielding a revenue of $11,000,000 per year.

That the additional value exists is manifest; that the properties may apparently be bankrupt and in the hands of Receivers does not at all subvert its existence.

In The Railroad Tax Cases, 92 U. S. 575, it was shown that one of the companies involved "is insolvent, and in the hands of a receiver. It is unable to pay any interest on its bonds. Its capital stock is of no value. But the board of equalization assessed the capital stock and franchise at $2,003,415, and its tangible property at $2,629,367, thus assessing a property which pays but little, if anything, beyond its running expenses, at the sum of $4,632,782." (Page 606.) This was offered as a reason for the invalidity of the assessment. But, in disposing of the matter, the court said:

584 "This sounds plausible; but is nothing more. Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable,—there remains what is valued as worth over $2,600,000 of real and personal property, which like all other property of individuals and corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value,—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling stock, and other tangible property? Is it supposed by any one that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bond-holders sell all these things under their mortgage at auction as a man would sell town lots and household furniture and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when con-

sidered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose." (pages 606-607.)

Destroy the terminals in the cities and deny the carrier access to them, and you destroy a value far in excess of the value of the land upon which the terminals are situated and the value of the steel and ties in the terminal tracks. Because over these terminals are handled the traffic originating at or destined to stations in Anderson county,—for instance,—and because the ties and rails and
585 station building are located in Anderson county whereby this traffic can be secured, the ties and rail and station buildings in Anderson county add something to the value of the terminals in distant cities, and the terminals in the distant cities add something to the value of the ties, rails and station buildings in Anderson county. Because of time and use the road-bed as a whole has acquired a value in excess of the cost of acquisition or the cost of reproduction new; that this element of value exists is testified to by appellant's General Manager (Statement of Facts 161-162); the amount of this value is estimated by Mr. Freeman at the minimum sum of $1,000,000. And yet, if the organic unity of the road were destroyed, or impaired, by the destruction of the terminals this element of value throughout the line would be measurably impaired, for how could the "seasoning" of the road-bed be worth anything if the use of the road itself were destroyed? If the terminals were destroyed, the use of the rest of the road would be diminished; if the mileage in Anderson county,—for instance,—were segregated from the whole and destroyed or sold this would necessarily impair the value of seasoning of the line in Tarrant county because the transportation of traffic between Fort Worth and Palestine constitutes a portion of the use of the road in Tarrant county. Necessarily, also, the existence of the ties and rails, and a place for them, in Anderson county adds something to the value to the company of its Express and Mail Contracts because express matter and mail are received and delivered in that county; and for a like reason, the existence of the Express and Mail Service adds something to the value of the physical equipment in Anderson county. And so, as to value, every piece of equipment and every activity is bound together, and each has a value,—independent of its intrinsic worth,—because of all the others. And because the additional values grow out of and exist because of the "organic unity," they cannot be localized as between the various counties through which the road operates. For who can trace
586 the line of demarkation between the intrinsic worth of each unit of physical equipment and the additional use given it by the organic relation, or measure out in dollar and cents the separate values?

And yet because our laws require the intrinsic worth of the units of physical equipment in each particular county to be value there, and require the total value to be ascertained by State agency, somebody must make the attempt at segregation. And who is best qualified to make the attempt? Manifest Reason suggests that the Man-

agers of the property, because of their relation to it, and familiarity with it, are best qualified to make the classification insofar as it may be made at all. Certainly the appellants are in a better position than anybody else to say what their road-bed, buildings, etc., in Anderson county are worth when separately and intrinsically considered. This would seem to be obvious.

And this classification as to the property in each and all of the counties they have made from year to year. Under solemn oath they fixed the value in all of the counties for the year of 1915 at approximately $14,000,000.00, exclusive of "rolling stock". And the "rolling stock", under oath, they valued at $2,168,906, for the same year. Making a total valuation by them of $16,168,906.00. Surely this valuation is of some probative force. It is sworn to. It is a declaration against interest. It is a declaration made to become a public record for the guidance of public officials in the performance of their duties. If it be said that appellants caused perjury to be committed in order to escape taxation in the various counties, this, of itself and in all fairness, ought now to estop them from challenging the accuracy of the classification. By every rule known to jurisprudence this declaration ought to be accorded the maximum of probative force. To accord it other than maximum probative force is to invite continued perjury and place a premium on chicanery.

Of this declaration and classification the State Tax Board knew,
and must have known, and of it they surely had the
587 right to take notice, in ascertaining the value of the tangible
properties. At all events it must remove any justifiable ground for saying that the Board acted fraudulently, arbitrarily or unlawfully in finding a value of $28,372,810 for the same elements of property to which the appellants themselves, under oath, affixed a value of only $16,168,906.

Under the statute and under the Constitution, the State Tax Board might, lawfully, have taken this $16,168,906 as its valuation of "tangibles". This is could have done for two reasons:

In the first place, appellants would have been estopped to question a valuation made according to their own representations, Inland Lumber Co. vs. Thompson, 11 Idaho, 508; 83 Pac. 933; Slimmer vs. Chickasaw County, 118 N. W. 779; Clyburn vs. McLaughlin, 103 Mo. 521; 17 S. W. 692.

In the second place, this authority is plainly recognized by the Supreme Court in M. K. & T. Ry. Co. vs. Shannon, 100 Texas, 379. This proposition involves an expression made by the Court of Civil Appeals in its opinion in this case. The expression reads as follows:

"Any statute which conferred upon the State Tax Board the power to value and assess tangibles as intangibles and apportion such values among the various counties as provided in this statute would clearly be obnoxious to the provisions of the constitution which requires tangible property to be assessed in the county in which it is situated."

The State Tax Board does not "assess" anything. It values. There is a difference between an assessment and a valuation. While

Sections 8, 11 and 14 of Article 8 of the Constitution seem to require the assessment of property to be made in the counties, but Section 1 of the same Article provides that "all property in this State, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value, which shall be ascertained as provided by law." In the Shannon case the Supreme Court discussed these provisions of the Constitution, in relation to the duties of the Tax Board, said:

588 "If it be conceded that it was the intention of the makers of the Constitution to confer upon county assessors the exclusive power to list and set down the value of all property in their respective counties, subject to an ad valorem tax, it cannot be denied that the Legislature is empowered to provide the mode of ascertaining their value." (Page 392.)

There would seem to be no more objection,—from a constitutional standpoint,—to permitting a State Board to value "tangibles" than there is to permitting *to* to value intangibles. The Constitutional provision referred to does not say that "all property of railroad companies, except intangibles, shall be assessed * * * in the several counties"; it said "all" such property shall be so assessed, except rolling stock. And upon this point we call attention to the following language of the Supreme Court in the Shannon Case: "Our Constitution, after declaring that 'taxation shall be equal and uniform' and that property shall be taxed according to its value * * * adds in the same sentence 'which (value) shall be ascertained as may be prescribed by law.' This would seem to leave the Legislature free to adopt the mode of ascertaining the value of any class of property by such method as it might deem best." (Page 395).

The Intangible Tax Act, at the time of the decision in the Shannon Case, provided that the State Tax Board might take the value of the physicals as assessed in the various counties as the measure of the "true value of the tangibles", and the point was made and urged that this was an arbitrary and artificial rule violative of the Constitution. The court held that this was not an arbitrary rule; "on the contrary we think they are reasonable and well calculated to effect the purpose of the Act" (page 394). The Act as it then existed provided for the finding of the value of the entire properties substantially as provided by the present Act and required the Board, except where the evidence showed some other method to be more just, to deduct from the "entire value" "the assessed value for taxation of all the property and assets of said company * * * as the same is found to be assessed for state and county taxation
589 in the locality wherein the same is legally taxable." (See Acts of 1905, page 355), and the remainder was required to be fixed as the value of the intangibles. As stated before, these statutory rules were upheld and approved by the Supreme Court in the Shannon Case. The Board then as now to find the true value of the physicals (See Section 6, Act of 1905) but it was expressly authorized to take the assessed value as the true value of the physicals.

The Act of 1905 was superseded by the present Act, and while the express authority to take the "assessed value" as the true value was dropped from the statute such implied authority remains because necessarily the discretion of the Board was materially broadened by the new Act. By Article 7420 the Board is expressly empowered to follow 'any method of calculation which it believes best calculated, under all circumstances, to bring a just' valuation of the properties. Under the Act of 1905 the "assessed value" as the basis of the finding of tangible value was required unless the evidence indicated a better method; the abolition of this requirement by the Act of 1907 did not mean that the Board could not still take this basis, if it thought proper under the evidence, but simply meant that this or any other method warranted by the evidence might be pursued.

Now the appellants reported to the State Tax Board the assessed value of their tangibles as being $30,313,436, including "rolling stock" (Statement of Facts, pages 88-89). But this included the "intangible valuation" for the preceding year, the sum of $14,000,000, approximately (Statement of Facts, page 165), and the assessed value of the tangibles was, therefore, approximately $16,313,436 (including "rolling stock"). The value as rendered in the various counties, as shown above, was approximately $16,168,906.00, corresponding very closely with the "assessed value".

590 If results, rather than forms, are to be regarded as determinative of the validity of the Board's action, we think the above figures should be regarded as the "value of the tangible property" for the purpose of testing the legality of the results. We shall, later, submit the proposition that every possible hypothesis which might support the action of the Board must have been negatived before the court would be authorized to annul the results; this proposition is based upon the principle of law, which we understand to apply here, that it is immaterial that an administrative or quasi-judicial Board, or an inferior court, may ascribe an improper reason for its action so long as the final result of the order, or judgment, is substantially correct. If this proposition is sound and we think it is, it affords an undoubted hypothesis upon which the valuation of intangibles may be sustained. Appellants admit, and the Court of Civil Appeals finds, that the entire properties are worth at least $34,000,000 (the valuation made by the Railroad Commission, plus additions and betterments). If either the amount sworn to by appellants as the value of their tangibles, or the "assessed value" of the tangibles, is deducted from the minimum value of the "entire property", more than $15,000,000 is left as the sum which might be fixed as the value of the intangibles under the provisions of the statute and under the authority of the Shannon case: this sum exceeds the valuation of intangibles as fixed by the Board by more than $4,000,000.00. That this hypothesis is reasonable and lawful and that its application could not operate an unconstitutional discrimination against appellants so conclusively appears as to preclude the granting of equitable relief.

This necessarily follows from the very Constitutional provisions which appellants invoke. The sole purpose of our laws in regard to taxation is to compel each person to bear the burdens of government

in proportion to the amount of property he owns, and when all alike equally share in this burden, no one has a right to equitable relief,

591 even though one piece of the property of the person seeking relief be valued above other property, if there be a sufficient decrease in the valuation of another piece of that person's property to make him pay the same amount of taxes according to what he owns that every other citizen pays,—M. K. & T. vs. Hassell, 123 S. W. 191; C. R. I. & G. Ry. Co. vs. Ratliff, 177 S. W. 571. Let us apply this principle to facts of this case about which there is no dispute. Appellants own property in the State of value at least of the sum of $34,000,000.00; this is assessed for taxes,—including the intangible valuation made by the Board,—at about $26,000,000 (S. F. 165). They have property in Harris county exceeding $3,205,202.00, assessed in the county at only $1,106,105.00, and including the amount certified to the county out of the "intangible valuation", their properties in Harris county are assessed at only $1,709,332 (Transcript, pages 84-85). In addition to the $3,205,202.00 they have valuable "franchises" in the county (S. F. 150) which certainly must be regarded as "going concern" or "intangible" property. But if we consider only the $3,205,202.00, then they are taxed on only about 34% theerof, while other people generally in the county are taxed on at least 50% of the value of their property; if only the $3,205,202 is to be considered, then, in order for appellants to be taxed on their property in the general proportion, they owe taxes on at least $496,496.00. Certainly a court of equity, called upon to prevent discrimination in taxation, ought not to create discrimination; and this the court will inevitably do if the total assessment of appellants is reduced below $1,602,601.00 (50% of the sum of $3,205,202.00). Under no conceivable view of the record should the $603,227 apportioned to Harris county by the State Tax Board be reduced below the sum of $496,496.00 if M, K. & T. vs. Hassell, and C. R. I. & G. vs. Ratliff, supra, are sound, and in both cases the Supreme Court refused writs of error.

592 But if we are in error in what has been said above, certainly the valuation of $16,168,906 placed upon their tangible properties by appellants themselves is competent evidence to support the proposition that the Tax Board did not act arbitrarily and without cause in finding $28,372,810.00 as the value of the "tangibles".

That the Board was amply justified in valuing the "tangibles" no higher than $28,372,810.00 is clearly shown by evidence other than that which has just been mentioned.

For the purpose of enabling the Board to perform its duties, the statute (Article 7415) required appellants to "make out and deliver into the possession of the tax commissioner a statement containing the information required—(by Article 7416)—which statement shall be duly verified by affidavit." Amongst the information required to be given in the Statement (by Article 7416) is the following: "(*f*) The assessed value and also the true value of all the tangible property owned—in each county in this state and the total assessed value and also the true value thereof." Article 7417 re-

quires the Board to "examine" the statement, and Article 7418 requires the Commissioner to place the statement before the Board. Article 7419 requires the Board thereupon carefully to "examine and consider the said statements" and " if they deem it advisable to do so" the Board shall hear further evidence. The Board is expressly required to consider the matters shown in the statements in the making of the valuations. These statements were made for the year in question, were received by the Board and were considered by it. About this there is no question. The statement so made by the appellants, and so considered by the Board, showed the "true value of all the tangible property" (except "rolling stock") to be the sum of $26,026,810.78. (S. F. page 88.) The value of the rolling stock was shown to be $2,168,906.00. A total valuation of all tangibles of $28,194,976.78. Now we are left to a presumption that this evidence was considered by the Board in its finding of "tangible" values; Mr. Bagby testified that the Board took these figures submitted by appellants as the basis of its finding,—(S. F. pages
593 350-351. These things are uncontradicted.

Viewing the purpose of requiring the Reports to be made by appellants together with the undisputed fact that the Board acted upon the information thus given, it must be clear that appellants are the contrary we think they are reasonable and well calculated to effect the purpose of the Act" (page 394). The Act as it then existed estopped to question the accuracy of the finding as to value of tangibles. Estoppel was pleaded. (Tr. p. 45.)

Appellants say that the Board acted arbitrarily and unlawfully in considering the evidence thus furnished by them under oath. With sublime assumption they pass, without comment or attempted justification, the fact that their agents, under oath, for the same year, fixed a value on the same elements of property $12,000,000 less than the value found for it by the Board, they ignore the plain fact that these agents again, under oath, stated directly to the Board that the tangible properties were worth only $28,168,906; and then proceed to yell fraud because the Board believed their agents might be able to tell the truth at the second trial and because the Board accorded truthfulness to the sworn statements. Their attitude means that it is all right for them to cause the commission of perjury in order that the public may be defrauded of revenues to which it is entitled, but that it is little less than a crime for an officer to accord them the belief of truthtelling. We believe the processes of the law may not thus be mocked, and that Equity will turn a deaf ear to such an appeal for advantage from appellants' own wrong.

Mind you, we are here trying the validity of an order of a quasi-judicial board which imports verity. The attack must be sustained, if at all, because there is no reasonable hypothesis to support the order. The burden is upon the besieger to negative the existence of sufficient evidence. The order, prima facie at least, is regular and is based upon lawful grounds. Until all possible lawful grounds have been shown as non-existent the order remains conclusive.

The sworn rendition by the appellants, and the sworn report to the Board, certainly constitute sufficient evidence to sustain this

particular finding if the facts stated under oath by appellants
594 for the guidance of these officers are worthy of credence. But appellants say the affidavits of their agents are unworthy of belief and should have been ignored by the Board for two reasons:

First. Because one of their agents,—the man who told the County Officials, under oath, that appellants' tangible properties were worth only $16,138,906,—after the making of the sworn report to the Board by another agent said that this other agent was mistaken in his statement of tangible values. In other words, appellants say, because Mr. Holder, after the preliminary valuation, said that the sworn report by Auditor Werner was erroneous in its statement of tangible values, Mr. Werner's report ought to have been disregarded as unworthy of credence. This position would appear to an ordinary man to be exceedingly puny, if not in fact pusillanimous. Let us analyze this remarkable position from the standpoint of the Board:

In stating the value of "tangible" properties to the Board the motive, clearly, is to state them as high as possible. Mr. Werner's report was formally and deliberately made, and he must have known at the time of making it that the higher he could consistently show the physical values the lower the intangible values would be. Of course, as Auditor of these properties for a long time he knew, or at least presumptively knew, that these same tangible properties had been listed, under oath, at about $16,000,000.00 in the various counties. From all the information he had as to the properties and business of the Company he arrived at the conclusion that $28,194,976.78 was as high a valuation as he could swear to; and thereupon this figure was set down and sworn to, and the report as sworn to was filed for the guidance of the Board. Now, Mr. Werner appeared before the Board and testified upon the final hearing, and the record shows that he did not tell the Board that his figures were correct, nor did counsel for appellants ask him a single question about this valuation. His testimony before the Board is set out on pages 47 to 55 of the Statement of Facts in this case, and nothing can be found in it to show that he ever intimated to the Board that
595 his figures were incorrect, or that even in his judgment they were too low.

At the hearing before the Tax Board, appellants, without having asked Mr. Werner about the tangible valuations, placed Mr. Holder on the witness stand. He said that the data shown in Mr. Werner's report as to tangible values was the same as that shown in the reports "for the last several years," and that it was furnished by his office to Mr. Werner. (Statement of Facts, page 61.) But the fact remains that Mr. Werner included the figures as his own over his own affidavit, and there is absolutely nothing to show that the figures did not represent Mr. Werner's own judgment as to the valuations. Thereupon, Mr. Holder gave it as his opinion that Mr. Werner's figures and report "does not show the true physical valuation." (Statement of Facts, page 61). The Board, therefore, had before it Mr. Werner's estimate of value, unimpeached so far as Mr. Werner was

concerned, and corroborated by the undenied fact that the estimate was in line with the estimate made by the railway company from year to year "for the last several years." To say that it was bound to take Mr. Holder's opinion in preference to that of Mr. Werner, and in preference to the valuation formally made by the railway company "for the last several years," is to deny to the Board all discretion in passing upon the weight of the evidence and the credibility of the witnesses, a function that is not denied to any other quasi-judicial, or judicial, body in existence. To deny this right to the Board is to say that it has absolutely no discretion as to the minimum value to be placed upon tangibles but that it must take the latest and highest estimate of value placed upon the property by any of the Carrier's witnesses.

That the Board acted reasonably, at least not arbitrarily, in preferring Mr. Werner's estimate over that of Mr. Holder is a conclusion that may properly be drawn from the evidence. Mr. Werner, as stated before, was corroborated by the figures submitted for "the last several years"; he has been in the employment of the rail-
596 way company for many years in the responsible position of Auditor and Assistant Auditor (Statement of Facts, page 77), positions in which he must have become intimately acquainted with the affairs and properties of appellants, whereas, Mr. Holder had been in his position only for "a short time" when Mr. Werner's report was made. (Statement of Facts, page 61.) The Board understood, and the record very clearly indicates, the motive of the appellants and of Mr. Holder to "boost" the tangible values at the final hearing, and this was assuredly a matter rightly considered in determining the weight of Mr. Holder's testimony. Besides the Board knew that this same Mr. Holder had shortly before rendered, under oath, these same tangible properties as having a value of only $16,168,906.

The other circumstances assigned as indicating that the Board acted arbitrarily and unlawfully in taking $28,372,810.00 as the value of the "tangibles" is the fact that the Railroad Commission had valued the properties of appellants at $32,471,027.05, exclusive of some additions and betterments, which valuation the Court says was shown "by the undisputed evidence to be their fair value."

The record will be searched in vain for any evidence whatever to show that the Commission's valuation was the fair value, either of the properties as a whole or of the tangible properties, aside from the mere circumstance of its having been made by the Commission. The appellants expressly declined to admit that the Commission's valuation was correct. In the formal argument filed with the Board by counsel for appellants they say: "We do not mean to admit that the tariffs (meaning the Commission's valuation) are correct" (Statement of Facts, page 43); "we have not undertaken to discuss what are the physical valuations of the I. & G. N. Railway Company, nor do we admit the correctness of any mentioned." (Statement of Facts, page 44.) This formal argument was filed with the Board for its guidance in making the final valuation, and it seems reason-

able to say that the Board was not bound to take a valuation
597 (for tangibles) which appellants themselves declined to agree to be correct.

Another reason why the Board was not bound to take the Commission's valuation of all the properties as the value of the tangibles alone is to be found in the fact that this valuation included 6 per cent as a "franchise value." (Statement of Facts, pages 42, 373.) This is undisputed, and therefore the Board would have been bound to find approximately $2,000,000 intangible values if it were bound to take the Commission's valuation at all, for certainly no one will contend that a "franchise value" is a "tangible value." In addition to the above mentioned 6 per cent "franchise value" allowed in addition to the total valuation by the Commission, the valuation of the Commission, also, included the value of specific "franchises." For instance, its valuation of the Magnolia Park Line aggregated $515,475.29 of which $100,000 was allowed for the "value of the franchises on streets of Houston." (Statement of Facts, page 370.) The total amount of franchise values included in the Railroad Commission's valuation is not shown in the Record, but the above indicates that a considerable amount must have been included on this account. So it must be clear that it would have been improper for the Tax Board to have placed the value of the tangibles alone at the Commission's figures, even if it had been proper for this valuation to have been taken as a basis for the action of the Board. There is absolutely nothing in the record to show that the Commission's valuation would have exceeded the physical values found by the Board if the "franchise values" included in the Commission's valuation had been deducted. We repeat that the order of the Board was prima facie valid; appellants were attacking it for lack of supporting evidence; the burden was upon them to show lack of evidence; they could easily have shown the amount of franchise values included in the Commission's valuation, and this they refused to do;

we think it necessarily follows that a mere showing that the
598 Commission's valuation, as a whole, exceeded the value allowed by the Board for tangibles alone is wholly worthless and incompetent to impeach the order of the Board. We say that the undisputed facts just mentioned demonstrate the proposition that it would have been improper for the Board to have accepted the Commission's valuation as a whole as the value of the tangibles alone, even if it had been incumbent upon the Board to take the Commission's valuation as a basis for its findings.

But there is nothing in the law that indicates any duty to take the Commission's valuation as a basis. That any such duty exists is expressly negatived. The statute, which measures the powers and duties of the Board, very clearly imposes upon it the duty of exercising its own discretion in finding values independent of any other agency. If the Legislature had intended for the Board, to any extent, to be bound by the Commission's valuation it would have said so; it neither said so expressly or by implication. The entire statute negatives any such implication. It expressly mentions certain data to be acquired and considered by the Board; among this

specified data the reports or valuations of the Commission are not mentioned. According to the statute, the Board could act alone upon the data specified, or it can call for or acquire any other information deemed needful; and upon the data specified, and such additional information as may have been acquired, the Board is commanded to exercise its own independent judgment. To hold, therefore, that the Board must accept the Commission valuations is to hold that it must simply execute the judgment of the Commission and leave its own discretion unused. Of course, the Board, under the general terminology of the Act, may consider the Commission's valuations for what it may think the information is worth, but the law will be read in vain in an effort to find anything that hints at its duty to be bound thereby.

Appellants made no effort to show the Board what the true
599 value of their tangible properties were worth; they were content to rely upon the Commission's valuation, plus some additions and betterments, to indicate the minimum value which should be placed upon the tangibles, and at the same time expressly told the Board that they declined to admit the accuracy of the Commission valuation. This, together with the simple statement of Mr. Holder that Mr. Werner's sworn report as to the value of tangibles did "not show the true physical valuation," is all the assistance they rendered the Board.

In view of the matters above set forth we submit the proposition that there is absolutely nothing in the Record to impeach the finding of the value of "tangibles" as made by the Board, but that, on the contrary, the findings made by the trial court are supported by the overwhelming preponderance of the evidence.

II.

The Finding as to Value of the Entire Property.

We again defer discussion of the "formulæ," insisting that if there was sufficient evidence to support the Board's basis findings of value the supposed arithmetical errors were immaterial.

There were but two things which the Board were authorized to consider and determine upon the final hearing. One was the value of the physical properties; the other was the value of the entire properties; the difference between these two things, as found, was determined by the statute itself as "the true value of the intangible properties."

Upon this issue, appellants made no serious attempt to assist the Board. At no place in the proceedings before the Board or before the courts have they made any attempt to show what the true value of their entire properties *were*. True it is they have offered certain theories and rules in an effort to show incorrect results; but these theories and rules themselves are arbitrary and artificial, as will be be shown hereinafter. They have insisted that, according to these rules, there could not have been a value equal to that found by the

Board, but nowhere have they denied that their properties, as a matter of fact are not worth the amount found by the Board.

600 Before the Board, as before the courts, they offer the valuation of $32,471,027.05 plus $1,542,065.02 invested in additions and betterments. But, as stated before, they emphatically told the Board,—before the final valuation was made by it,—that they did not admit the correctness of the Commission's valuation. They also told the Board that 6% was included in the Commission's valuation as "franchise value" (S. F. 42). The theory on which they offered the Commission's valuation to the Board upon the question of "entire value" while declining to admit its accuracy, as stated by them, was an effort to convince the Board of the supposed injustice of taking the Commission's valuation as a limitation upon stock and bond issuance and income while taking a higher valuation for taxation purposes. That there is no injustice or illegality in taking one valuation for security and rate purposes and a higher valuation for purposes of taxation is uniformly held by the courts. (See ——.) But if there were injustice in such a practice it simply flows from the public policy instituted by the State, the legality of which is in no way involved in this case. So long as the Railroad Commission and the State Tax Board remain as independent agencies, charged with the duty of exercising their best judgment as to matters confided to their respective jurisdiction, it is probable that there will be differences in the results reached by them. This is natural; it is the inevitable result of individuality. I say that a certain horse is worth $100.00; you say that he is worth $150.00; both of us express our honest judgment, and neither of us can say, in detail, just why we think the value is as we state it.

But the Commission's valuation is in evidence; it is to be considered for what it may be worth. We have stated certain reasons why we think it cannot be taken as a minimum valuation of tangibles. The same reasons would indicate that it may be given some weight upon the question of the value of the entire properties. Plus the amount shown for additions and betterment, the valuation is the minimum estimate of the value of the entire properties.

601 It furnishes, therefore, a starting point and compels the conclusion of error in the judgment of the Court of Civil Appeals. For if this $34,013,092.07 be taken as the value of the entire properties, and $28,372,810.00 be taken as the value of the tangibles, the statute itself compels a finding of $5,640,282 intangible values. $5,640,282 is 52.5% of $603,227 (the proportion of the $10,743,223 belonging to Harris county) is $316,694.17, the taxable value belonging to Harris county if it be proper to reduce the total intangible valuation to $5,640,282. If this valuation of $316,694.17 is allowed to Harris county, the evidence is conclusive that there would be no discrimination against appellants. The unchallenged finding of fact by the trial court is that other property, generally, in the county is assessed "at at least 50% of its value." (Tr. p. 86.) There is ample evidence to warrant a finding of a much higher per cent. Now the portion of the $34,013,092 belonging to Harris county

amounts to at least the sum of $2,731,822, and the assessed value thereof is only $1,106,105.00. (Tr. page 84.) If the $316,694.17 were added to the "assessed value" and taxes paid thereon appellants would not be discriminated against,—M. K. & T. vs. Hassell, 123 S. W.; C. R. I. & G. vs. Ratliff, 177 S. W.

A finding of $316,694.17 for intangibles in Harris county,—separately considered,—would be amply supported by uncontradicted evidence. In the valuation of the $515,475.00 for the Magnolia Part Line as made by the Commission $100,000.00 was allowed to cover the worth of the franchises pertaining to that one piece of line. The testimony shows this to be a very low valuation (S. F. 370-371; 150) (S. F. 370). Mr. Booth, Traffic Manager for appellants, testified that this and other franchises in Houston were very valuable (S. F. 150), but he placed no definite valuation thereon. In addition to this $100,000.00, the $2,331,822 included 6% as a general franchise value and this would amount to about $140,000.00.

But the undisputed evidence is that the "entire properties"
602 are worth much more than $34,013,092.07.

Up to June 30th, 1915, the sum of $46,502,041.55 had been invested in the properties (S. F. 130). This, of course, included expenses incurred in creating and maintaining the organization, securing franchises of various kinds, and in bringing the entire property to its present condition of an organized, going concern. Manifestly many of the things for which this expense was incurred could not be localized but belonged to the property in its "organic unity." An illustration of this is the sum of about $100,000.00 incurred in securing franchises in Houston, which franchises would be worthless,—or at least worth very much less than their present value,—if they were considered separately and as segregated from the entire railway or any part thereof. Of course, the physical equipment for which part of this money was spent has been subject to depreciation; but it is equally true that in other material respects the property has been subject to appreciation. An illustration of depreciation would be the wear and tear and deterioration of locomotives; an illustration of appreciation would be the seasoning of the road-bed by use and time, which element of value is admitted by Mr. Fay:—He said "A good track is the foundation of a railroad and the first requisite" (S. F. 152); "seasoning means, as to road-beds, settling; the main line of the I. & G. N. between Mart and Longview is pretty well seasoned, but there are a good many raw spots between Houston and Ft. Worth; as to the value of seasoning, and the length of time it takes, the witness stated he had no definite opinion, the problem depends too much on location and different situations." (S. F. 161-162.) Mr. T. J. Freeman said competent engineers estimate this value at from $1,000 to $5,000 per mile, and he estimated this value for the I. & G. N. at least $1,000,000.00. Whatever portion of the expense incurred to the company by reason of the acquisition of this element of value cannot be located; part of it, manifestly came out of the total investment mentioned; other parts of it

came out of operating expenses; obviously it is a value,—an
603 appreciating value—which has grown up and attached itself to the property because of the operation and use of the property as a going concern, as an organic unit. Another element of "appreciation" is derived by the growing volume of express and mail traffic, and the general growth of the business in all other phases. It would seem reasonable to say that the physical units of an enterprise devoted to a certain business would increase in value along with the general increase in the business of the enterprise. This, if true, would indicate that the property as a whole,—as a going concern,—is worth something more,—materially more,—than the actual investment less depreciation on the physical units.

Now the appellants' own books show that the property is valued by them at the sum of $37,243,133.44 (S. F. 243). But this takes account of depreciation on the physical units, but does not take account of any of the elements of "appreciation" such as "seasoning" and value acquired from a growing business of a going concern. Neither does it take account of the value of the express, mail, trackage and other contracts which necessarily contribute something very material to the value of the entire properties. It would seem, therefore, to be all together just and reasonable to take the $37,243,133.44 as the minimum value of the entire properties. And if this is done, and the value of tangibles as found by the Board ($28,372,810) is subtracted therefrom, the sum of $8,870,323 is left which the statute says may be taken as the value of the intangibles. This sum is 82% of the amount found as intangible value by the Board, and if the intangible valuation apportioned to Harris county were decreased proportionately it would be $494,636.

But there is uncontradicted evidence to show a value of the entire properties much in excess of the $37,243,133.44 and at least equal to that found by the Tax Board.

For instance there is the $1,000,000.00 value of "seasoning". As has been stated with some iteration the existence of a value of this kind is admitted by the witnesses for appellants, and Judge Freeman's minimum estimate of $1,000,000.00 has nowhere been denied or impeached. And if this element alone is added to the
604 $37,243,133.44,—shown above,—and the tangible values found by the Board is subtracted from the total, an intangible valuation of $9,870,323 is accounted for as against the $10,743,223 found by the Board.

Again:—Appellants are possessed of a long-term arrangement whereby they secure the use of some 55 miles of railroad track which they do not own and the use of valuable terminals, which facilities are used in the handling of the traffic of the entire line. That this contract, or arrangement is valuable, is self evidence. The appellants said it would be disastrous to their properties if the contract were set aside. Judge Freeman estimated its value at at least $1,000,000.00. And if this value be added to the $37,243,133.44 and the value of the "seasoning", we have a total of $39,243,133.44, which is an excess over the amount found by the Tax Board.

As already stated it is the custom of the Railroad Commission to

allow 6% as a general "franchise value". Its valuation (excluding betterments not valued) is $32,471,027.05, and 6% thereof is $1,948,261.00. This "franchise value", so-called is allowed for "overhead expenses," (S. F. 373),—that is supervision, etc., and is not in fact intended to be the value of the franchise to be, or the franchise to act, as a corporation. Appellants claim that this value ought to be allowed by the Commission, and Judge Freeman contended 10% ought to be allowed. This item, as allowed by the Commission, is not included in the $37,243,133.44 shown above, and if it should be added thereto (together with the value of the "seasoning" and the trackage contracts); there would be a total of $41,191,394.00, or two million dollars in excess of the total value found by the Tax Board.

These various items while included in the "organic unity" value, manifestly, do not include all of the items generally understood to be included therein. For instance there is the franchise to be a corporation, recognized everywhere as being a substantial element of value taxable by the State. This element is specially taxed (under Chapter 3, Title 126, R. S. 1911) as to other than railroad
605 corporations. Because the value was intended to be taxed under the Intangible Tax Law railroads are relieved from the Franchise Tax eo nomine (See Article 7403). If appellants had been subject to this Franchise Tax they would have paid about $1,500.00 thereon. This payment capitalized at the State Tax Rate (55 cents on the $100) would indicate the taxable value thus reached. In addition to the franchise to be a corporation, every corporation has a franchise to act and do universally recognized as a separate taxable value. Practically all corporations are taxed upon this element separately by the State under an occupation or gross receipts tax (See Chapter 2, Title 126, R. S. 1911). But because this element of railway values is supposed to be reached under the Intangible Tax Law, railway companies are exempted therefrom by Article 7426. By Chapter 2 Title 126, Terminal Railway Companies are required to pay a tax equal to 2% of their gross receipts, and it is reasonable to suppose that railway companies would have been taxed at the same rate under Chapter 2 if this tax had not been commuted in favor of the ad valorem tax under the Intangible Tax Law. Appellants' gross receipts, averaged, for the last four years were $10,396,079 (S. F. page 17); if they had been required to pay a tax thereon equal to that paid by Terminal Companies, they would have paid for the year in question, approximately, $207,921.58; whereas, on the valuation of $10,743,225.00 made by the Board they were only required to pay the sum of $59,087.74 State Ad Valorem Tax (rate 55 cents per $100). There is no data in the record from which we can tell the amount of county ad valorem taxes which are required to be paid on the $10,743,225.00, but it is probable, if not certain, that the total state and county taxes to be paid thereon would be very much less than the sum of the payment which would have been made under the Gross Receipts Tax Law. At all events, since the Gross Receipts Tax is primarily, a tax upon the occupation or the franchise to act as a corporation and since this tax has been commuted, it furnishes some index to the value of the franchise to act

as considered by the Legislature. Even if the railway com-
606 pany had been taxed on the occupation at only 1%, it would have paid $103,960 State Taxes thereby, and this capitalized at the State rate of ad valorem taxation (55 cents on the $100) would have produced $18,900,000.00. This would indicate that the Tax Board did not exceed the valuation intended by the Legislature to be placed upon appellants' property.

The Court of Civil Appeals indicates that a capitalization of the net revenues at 7% would show that there were no intangibles values to be found, and that, therefore, the valuation made by the Board is arbitrary. We mention this here because it not only involved error, but, also, because the principle when rightly applied to the facts indicates an intangible valuation equal to that found by the Board. The passage rule quoted by the Court of Civil Appeals from the Shannon case was not applied by the Supreme Court in that case; on the contrary the rules laid down by the statute, which, in their nature, were contrary to the "net profits rule," were on direct attack, upheld. We believe it proper to suggest that the Legislature would have prescribed the "net profits rule" if it had intended for it to be applied; this it did not do. On the contrary, its application is expressly negatived, unless, of course, the application of such a rule is, in the judgment of the Board, demanded by the evidence. On this exact point, on pages 394 and 395, 100 Texas, the Supreme Court said: "If a railroad is bonded for $1,000,000 and its shares at their market value are worth $500,000, it is reasonable to suppose, prima facie, that the property is worth $1,500,000. But for the reason that the shares in a corporation may have a value above what they would have as a profit paying property and its bonds may exceed its entire value, it would be unreasonable to require the Taxing Board to fix the sum of the bonds and the market value of its shares absolutely as the value. But without entering into a discussion of the provisions of the Act in detail, it is sufficient to say that it makes no such requirement. On the contrary, the rights of the companies are carefully safe-guarded by pro-
607 viding, in effect, that the Board may hear evidence and adopt such other method of determining the value of the intangible assets as they may deem just." This, it seems to us, necessarily means that the Board may properly consider the stock of a railway corporation as having a value in excess of its value "as a profit paying property," and since the value of the stock "as a profit paying property" depends primarily upon the "net profits" of the whole enterprise, the Supreme Court,—in the Shannon Case,—meant to, and did, hold that the Board was free to ignore the "net profits rule" in its valuation either of the "stock" or the valuation of the "entire property." This is also shown, we think, by the fact that the Court,—as stated on direct attack,—upheld the rules of the statute which necessarily in most cases at least the "net profit rule." The court upheld the rule which permitted the Board to take the value as assessed in the various counties as the value of the "tangibles"; the statute expressly denied to the County Officials the power to consider the "net profits" of the Railway in their valuation of

the properties in the county because it provided that "intangibles" should be valued alone by the State Board. If the statute had not so provided, it is common knowledge that the County Officials did not ordinarily consider the question of profits of the entire railway. It is clear, therefore, that there was no relation between the county assessments and net profits: and since the county assessments were authorized to be taken as one of the primary factors in determining the value of intangibles, the "net profits rule" could not be applied under the statute as it then existed. Of course, the discretion of the Board has been broadened by the present statute, and the Board may consider net profits and may apply the rule if it thinks proper; but there can be found no provision requiring them to do so. To say that the Board is bound to apply this rule, is to say that it shall not exercise the discretion expressly vested in it. The supposed showing as to net revenues, and the supposed result of the application of the "net profits rule," are wholly insufficient, we submit, to condemn the values found by the Board.

608 But the court must have misunderstood the showing of the record as to net revenues; and it assuredly was mistaken in assuming that 7% ought to be taken as the basis of capitalization.

Manifestly 7% is too high a rate of capitalization to be applied in cases of investments as large at that of appellants. This is the current rate on such investments, or loans, as are generally made in this section of the country. It would seem obvious that a loan of $100.00 or of $1,000.00 would take a higher rate of interest than a loan of $100,000.00; and certainly a loan of $100,000.00 would take a very much higher rate of interest than a loan of $34,000,000.00 or $40,000,000.00 would take. No man ever heard of interest being paid on a loan of such large amounts at as high a rate as 7%. No court has ever held *a* public utility rates to be confiscatory because they failed to permit as much as 7% return on the investment.

The evidence offered by appellants to sustain the 7% rate consisted largely of the testimony of Mr. T. C. Dunn. His direct testimony upon this point is summed up in the following question and answer:

"Question. What would be a fair, conservative income on stocks or bonds or other loans?"

"Answer. Something around 6 per cent or 7 per cent." (Statement of Facts, page 121.)

It will be noted that no attention was paid to the size of the investments covered by the question, and, obviously, when the witness answered he had in mind a general average taking into consideration small investments as well as the larger ones with which he may have been familiar. On cross-examination he testified as follows: "That he did not run across sales of stock very often; that he did not think they were sold down here (meaning in Texas) very often; that larger loans carried, as a usual thing, lower interest, and that the largest loan of his bank (Union National Bank of Houston) was $120,000 at 7 per cent, but that he did not think that his bank got more than 8 per cent from any one; that he had had no experience

with loans of several million dollars, and had had no oc-
609 casion to investigate what interest on them should be, and that as to a loan of $11,000,000.00 or $10,000,000.00, his only information would be from reading newspapers and the financial journals; that these large railroad loans carry a lower rate than bank loans, and thought that the rate was between 3 per cent and 5 per cent; * * * that he considered 6 per cent or seven per cent would be a fair investment return in Texas, but in so stating he had not particular reference to railroad transactions." (Statement of Facts, pages 123-124.) This witness, relied upon by appellants, makes it clear that he did not ha e large railroad investments in mind when he indicated 6 per cent or 7 per cent as a fair return; his testimony would warrant a finding of 3 per cent much more strongly than it would 6 per cent, and there certainly is nothing therein to justify a finding of 7 per cent. It is needless, we take it, to cite the numerous cases where railroad rates permitting a return of 3 and 4 per cent on the aggregate of stocks and bonds have been upheld.

The "net revenues" of appellants for twenty-five years are shown on page 109 of the Statement of Facts. For the twelve years from 1903 to 1914, inclusive, these revenues aggregated $19,957,347.36, or an average of $1,663,112.28. This average yearly return, capitalized at 4 per cent would produce $41,577,805.00. Mr. Dunn, appellants' witness, said that the rate on such large railroad investments was "between 3 per cent and 5 per cent." We think it fair, therefore, to take 4 per cent, the average of Mr. Dunn's figures, as the rate of capitalization. This is assuredly warranted by the evidence, and when it is done a result is produced which more than substantiates the Tax Board even under the application of the "net profits rule."

The Court of Civil Appeals calls attention to what it supposes to be the net revenues for 1912, 1913 and 1914, capitalizes the same at 7 per cent, and thereby produces the following valuations for the years named in their order, to-wit: $29,743,564.28 (1912); $16,-
610 523,727.43 (1913); and $934,361.00 (1914). The basic figures used by the Court were erroneous, as will be presently pointed out, but taking them as used by the Court, and capitalizing at 4 per cent the valuations for the same years would be $55,089,-834.00 (1912); $28,916,510.00 (1913); and $1,635,131.75 (1914). But the basing figures used by the court were erroneous. The "net operating revenues" for these three years, before deducting "hire of equipment", taxes, etc., but after deducting "operating expenses", as shown on page 109 of the Statement of Facts were the figures set out below in column 1; the "net income available for dividends, and interest" for said years, as shown on page 100 of the Statement of Facts, are set out in column 2 below:

1912	$2,809,999.14	$2,203,593.36
1913	2,733,085.40	1,668,236.40
1914	1,919,794.25	878,327.60

In reaching the figures shown in column 2 above, Mr. Werner, Auditor of appellants, said he had first deducted "operating ex-

penses", taxes, hire of equipment and miscellaneous charges. (Statement of Facts, 101). We shall contend that the figures contained in column 1 are the ones which ought to be used in finding values by capitalization, but if the figures in column 2 are taken for this purpose and capitalized at 7 per cent the following results will be obtained: $31,479,905.00 (1912); $23,831,948.00 (1913); and $12,547,537.00 (1914). Capitalized at 4 per cent the figures in column 2 produce the following valuations: $55,089,823.00 (1912); $41,705,910.00 (1913); and $21,958,190.00 (1914), or an average for the three years of $39,584,641.00. The year of 1914 was an abnormal year for this property for two reasons: The revolutionary conditions in Mexico cost this road about $1,000,000 (See testimony of Mr. Booth, Statement of Facts, page 56); the great floods of 1913 occurred in the latter part of the year and the expenses incurred to the road thereby are reflected in the figures for the fiscal year ending June 30, 1914, which is the year covered by the figures shown above;

Mr. Booth testified that the damage to the physical properties amounted to about $250,000, and that they lost at
611 least that much more in loss of traffic. (Statement of Facts, page 57). These conditions, of course, account very largely for the small gross and net earnings for the year of 1914, and hold the average earnings for the three years down very materially. This, we think, would make it improper to take the earnings for 1914 as a guide.

But we insist that the figures shown in column 1, above, should be taken as the basing figures in any application of the net income theory. These figures represent what was left after all "operating expenses" had been deducted. Taxes and "hire of equipment" are not operating expenses; they are not so classed by the Interstate Commerce Commission, or any of the State Commissions. Taxes are not taken into account in arriving at the value of the stocks of the merchant. If it were proper to take taxes into account in arriving at taxable values, there would be much substantial property which would escape the burden altogether, especially under the application of the income rule. The easiest illustration of this would be un-used real estate. "Hire of Equipment" should not be taken into consideration in arriving at value for the reason that it is a capital charge, so recognized by the State and Federal Governments. It is a rental paid for leased property, and it has no relation to the value of the property owned by the lessee. A certain man owns one farm and cultivates it; he also leases another farm from his neighbor and cultivates it; the question of the valuation according to income of his owned farm arises; obviously it would be entirely improper to deduct the amount of rents paid for the leased farm from the gross revenues in finding the value of the "owned" farm.

But there is a reason shown by the record without dispute which renders it unjust to say that the Board acted arbitrarily in not applying the net revenue rule. In measuring the conduct of the Board it would appear to be fair to say that it should be judged, in this respect, according to the facts before it at the time of the final hearing. It would also appear to be reasonable to say that any tribunal should

have evidence before it leading it to the belief that an enter-
612 prise has been well managed before it should apply the net profits rule. There was absolutely no evidence offered to the Board to show that the I. & G. N. properties had been properly managed. The entire proceedings before the Tax Board are set forth on pages 37 to 70 of the Statement of Facts, and not one word of evidence or argument can be found therein that in anyway indicates proper management of the properties. But in a general way the history of the enterprise was, shown, and it certainly justified the assumption that the property had been grossly mismanaged in the absence of a showing to the contrary. The testimony as to "good management", such as it is, came into the record for the first time at the trial of this case; it was not before the Board at all. The record affirmatively shows that Mr. Bagby, at least, thought the road was mismanaged. (Statement of Facts, page 353.) If appellants thought that the "rule of net profits" ought to be applied it was clearly their duty to show the Board that the property had been properly managed; this they failed to do. It would appear to be the essence of injustice, therefore, to say that the Board acted arbitrarily in failing to adhere to this rule when the main and basic fact was not proved, or offered to be proved, and when it had good reason to believe, and did believe, that the property had been mismanaged.

The showing made in the trial court as to "good management" is exceedingly shadowy. It consisted entirely of the expression of opinion by two or three witnesses in the employment of the appellants to the effect that the property had been carefully and skilfully managed. What does such expressions of opinion prove? Would it be reasonable to suppose that the men who are hired to manage a property of this kind would say that it was being mismanaged? Are such self-serving declarations by vitally interested parties to be taken as evidence competent to show a material fact? We think not; we submit that facts, and not self-serving opinions, should be taken upon this point. At all events, even this opinion evidence was not placed before the Board, and until proper management was shown the Board, we think, would have been justified in disregarding
613 the "net income rule" if in fact it had done so. But the evidence shows that the Board considered the matter of net income for what it may have been worth; just what weight was given it by the Board is not disclosed by the record.

As to the Value of the Stock Separately Considered.

The stock of the corporation was not for sale. It had never been on the market. It had no market value. The Board had a right to consider and find its real value. That it might have a value in excess of market value, or par value, or "value as a profit paying property," was held by the Supreme Court in the Shannon case. That it did have a value in excess of its par value and in excess of its "value as a profit paying property" is conclusively and clearly shown by the evidence. The evidence as to the value of the "'entire property"

has been set out and discussed above. That the stock was worth the difference between the indebtedness and the entire value of the property is a proposition which cannot be doubted. That it has such a value, and a value approximating that ascribed to it by the Board, was tesified to by the financial experts placed upon the witness stand by appellants in an effort to prove it to be worthless. (See testimony of W. D. Sherwood, Statement of Facts, pages 127-128.)

But if the valuation of the stock, separately considered, were excessive, this, we think would be immaterial so long as the final results of the valuation are correct, or, rather, so long as there was substantial evidence to warrant the Board's findings as to "tangible" values and as to the value of the entire property. For the valuation of the stock separately, under the statute, is simply a means to an end. It might be undervalued or overvalued, and the result might be correct. The evidence showing as it undoubtedly does that the Board was warranted in taking $28,372,810 as the value of the tangible properties and $39,116,033 as the value of the "en-
614 tire properties," the resulting valuation derived by subtracting the "tangible" valuation from the valuation of the "entire properties," the Board's action stands unimpeached, even though it were conceded that there was error in the calculation of the value of the stock separately. Suppose the Board had said that the stock is worth $100 and the bonds are worth $39,115,833, and therefore that the "entire properties" were worth $39,116,033; if the "entire properties" were in fact worth $39,116,033 what difference would it have made to appellants? The result to appellants would have been exactly the same if the Board had said that the stock is worth $30,000,000 and the bonds are worth $9,116,033, and therefore the "entire properties" are worth $39,116,033, if in fact the "entire properties" were, in fact, worth that sum. The fact is undisputed that the Tax Board, after considering all of the evidence, thought that the "entire properties" were reasonably worth $39,116,033 without regard to the value of the stock separately considered. This very clearly appears in the testimony of Mr. Bagby, the only witness upon the subject and the only witness who was in a position to know what the Board considered and how its judgment was formed.

As to the Formulæ.

Much has been said about the "formulæ." Appellants' whole case is largely based upon supposed mathematical errors in the processes of the formulæ. Not much attention has been paid to the question of whether or not correct results were reached by the Board. It seems to have been assumed that the formulæ controlled the judgment of the Board and that it necessarily led to the wrong results. Neither assumption, we think, is well founded.

Mr. Bagby says that the formulæ were private memoranda gotten up by him in an effort to give the carriers a mathematical process by which the results could be figured out. Whether the other members of the Board even considered the formulæ or not is not even shown, nor, apparently, did the appellants deem this at all material. The

other members of the Board were tendered to appellants for
615 use as witnesses, but they were not put on the stand. That the formulæ neither controlled the judgment of the Board nor led to incorrect results is, we submit, conclusively shown by the record.

The only connection of the formulæ with the valuation is that they were given out in connection with the "preliminary valuation." After that, and when the matter came on for final hearing, the Board heard and considered all evidence and argument offered and in the light of the evidence and argument considered the question as to the correctness of the valuation of "tangibles" and the valuation of the "entire properties." That the formulæ controlled the judgment of the Board at the final hearing is negatived by every piece of evidence in the record pertaining to the matter. Mr. Bagby testified that the Board considered all evidence before it as to the two factors just mentioned and that the valuation of the tangibles and the valuation of the entire properties represented its "best judgment upon all the information" before it. He also said that "disregarding the mathematical calculation" the "valuation represented the best judgment of which he was capable under all the information he had." (Statement of Facts, page 343.) He expressly said that after the promulgation of the formulæ the Board "took into consideration the evidence that was offered by the railway company at its final hearing." (Statement of Facts, page 349.) He also said: "That each of the railroads filed their reports in forms similar to those of the I. & G. N. and the T. & P. and had done so for five or six years back. That the Board considered these reports and the information in them * * * and that he considered the I. & G. N. reports and former valuations made by the Board of all railroads, and got information from any source where he could find it, and considered all the evidence and argument offered by counsel for the railroads, and their witnesses, and that the final valuation in each instance reflects the witness's honest judgment as to what the evidence showed the values to be * * * That after hearing the evidence and those
616 statements, the Board decided, in their best judgment, that some of them should be reduced, and that the witness concurred in such decisions, because of the effect of the evidence on his mind. That he understood the law required him to consider the evidence, that he did so to the best of his knowledge and ability. That the Board applied the formula, and if it resulted in what they thought, in their best judgment, was correct, they let it stand; that if the Board decided, after the evidence was in, that the formula did not reflect what one would call the best judgment of the Board, then the Board changed it." (Statement of Facts, page 365.) This testimony, which is not at all contradicted by anything this or any other witness said, shows, we say, that the Board, in the final valuation, considered all evidence and information in its possession upon the question as to the correctness of the results reached by it. If the results reached by the formula reflected what, in the judgment of the Board, were the correct results, they were allowed to become final; if the evidence showed that the results reached by the formula were

incorrect, then the results were changed accordingly. What more could have been done? It was the evidence, and not the formulæ, that determined the final results. What difference would it have made if originally the Board had multiplied four dogs by five cats and reached a certain result in dollars, provided that the result thus originally reached through incorrect mathematics was, on the final hearing, shown by the evidence to be substantially correct? The results independently considered, in the judgment of the Board, based upon a consideration of all evidence, were correct; would it have been of any benefit to the appellants for the Board to have entered a formal order saying that the formula was incorrect and that it was repudiated, but that the resulting valuations were correct and would be adhered to? If there is substantial evidence to indicate that the valuation finally made by the Board is approximately correct, it seems like quibbling to say that the erroneous processes of the formulæ produced substantial injury. We submit that the evidence
617 set out and discussed above clearly warrants the findings of value made, and that any error in the mathematical processes were harmless and such as to leave the action of the Board unimpeached.

Generally: The Burden of Proof.

We have heretofore discussed the matters involved as if the burden rested upon the appellees to show sufficient evidence to support the judgment of the Tax Board. Even if the burden of proof were so placed we are confident that the undisputed facts set out above would be sufficient. But, clearly, the burden is upon the appellants to show by satisfactory proof that the facts did not exist to support the valuation. The Tax Board was acting on a matter within its undoubted jurisdiction and confided to its discretion. Its order is at least prima facie valid. The appellants level an attack upon it because of matters not appearing in the face of the final order, and it would seem superfluous to cite authorities to the proposition that the burden is upon them to negative by affirmative and competent proof every lawful hypothesis upon which the Board may have proceeded. Nevertheless, the desire to cite and briefly discuss some authorities which we regard as being closely in point.

Fraud with bad intent is not seriously charged, if charged at all. Even if charged, no reasonable man can contend that there is any evidence to support the allegation. The District Court of the United States has passed upon the exact state of facts presented here, and repudiated any suggestion of fraud; the trial court expressly found that there was nothing upon which to base such a charge; the Court of Civil Appeals negatives its existence. All that is left is a charge of excessiveness of valuation which, according to appellants, amounts to legal fraud or a showing of arbitrariness. We have set forth evidence which in our judgment affirmatively disproves either excessiveness or an arbitrary spirit. But if this had not been shown, appellants still would have made no case.

618 A very similar attack, upon a very similar state of facts, was made upon a valuation in Railway Company vs. Backus,

154 U. S. 421. In that case the Railway Company reported its property values as being about $8,000,000; it had been assessed for the previous year at $8,538,053; the Tax Board increased this assessment to the sum of $22,666,470, an increase of about 150 per cent; the values of other railways were increased by only 43 per cent; upon the hearing before the Board the Railway Company proved up its net and gross earnings, and the per cent of return on the property on a valuation of about $8,000,000; the members of the Tax Board did not inspect the property nor did they examine any person acquainted with the value thereof. The Tax Board only called one witness upon the trial, one of its members, and he simply testified that no property located outside of the State was included in the valuation. Thereupon the Supreme Court said:

"Upon this testimony the decision of the Court was that there was nothing to impeach the assessment made by the State Board, and in this conclusion we concur. The true cash value of the plaintiff's property in the State of Indiana in the year 1891 was a question of fact, the determination of which for the purposes of taxation was given to this special tribunal, the State Board. Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the State Board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the Board. It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the Board sufficient to vitiate its determination. It is not, however, contended by counsel that there was any actual fraud on the part of that Board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact bore, and did so with the purpose of making the plaintiff bear a larger share of the burden of the support of the State government than it rightfully should. The contention is rather that the Board made a grievous mistake in placing so high a value, and that it took into consideration property outside of the State, and gave to the property within a value partly deduced from that without the State. The testimony, however, does not sustain this contention." Railway Company v. Backus, 154 U. S. 434-435.

[19] In Maish vs. Arizona, 164 U. S. 599, 610, the Supreme Court said that in a case like this, "Something more than an error of judgment must be shown, something indicating fraud or misconduct." And because of the analogy of questions there and here presented we quote the following from the opinion:

"There is nothing tending to show that the Board, in fixing the value of cattle at $7.42, acted fraudulently or with any wrongful intent, or that that valuation was not the result of its deliberate judgment upon sufficient consideration and abundant evidence, and it would be strange, indeed, if an assessment could be set aside because a single witness is found whose testimony is that the valuation was excessive. No assessment could be sustained if it depended upon the fact that all parties thought the valuation placed by the Assessing Board was correct. Something more than error of judgment must be shown, something indicating fraud or misconduct. Neither is the fact that an officer of the railroad company came before the Board and declared its willingness to pay taxes on a certain valuation and its intention to resist the payment of taxes on any higher valuation sufficient to impute fraudulent conduct to the Board, although it finally fixed the valuation at the sum named by the railroad company. It appears from the testimony of one of the members of the equalization board that it was guided largely by the valuation placed in other States and Territories upon railroad property, and that from such valuation, as well as from that given by the railroad company, it made the assessment at something like the average of the valuation of railroads in the various States and Territories named. It is unnecessary to determine whether this Board erred in its judgment as to the value of this property, whether it would not have been better to have made further examination and taken testimony as to the cost of construction, present condition, etc. Matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its judgment cannot be overthrown. Pittsburgh, Cincinnati &c. Railway v. Backus, 154 U. S. 421-435." Maish v. Arizona, 164 U. S. 610-611.

Perhaps, the loudest note in the roar of excessiveness is that produced by the supposed condition of bankruptcy. Appellants seem to think that because they have shown that the I. & G. N. is at its old habit of receiverships they have conclusively shown that the valuation is so grossly excessive as to render it void. A companion tune was played by the railway in Railway Tax Cases, 92 U. S. 575, 606. The Supreme Court stated the facts relied upon and disposed of the complaint as follows:

"The case of Toledo, Peoria, and Warsaw Company, as we have said, is used as an illustration of the inequality which this rule works, and which counsel say is forbidden by the Constitution of the State, thus rendering the tax assessed against it void. That company is insolvent, and in the hands of a receiver. It is unable to pay any interest on its bonds. Its capital stock is of no value. But the Board of Equalization assessed the capital stock and franchise at $2,003,-
415, and its tangible property at $2,629,367, thus assessing a
620 property which pays but little, if anything, beyond its running expenses, at the sum of $4,632,782.

"This sounds plausible; but it is nothing more. Concede for the present that the capital stock is sunk and is of no value; concede

that the funded debt of the company has at present no market value, or is unsalable,—there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this is of no value,—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling stock, and other tangible property? Is it supposed by any one that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town-lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose.

"It is this franchise which the legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debt, who shall say that it is not worth $2,000,000? and who shall say that such is not the real value now of this franchise?" State Railroad Tax Cases, 92 U. S., 606-607.

In Lufkin Land & Lumber Company vs. Noble, 127 S. W. 1096, 1097, the contention was made that since the Board of Equalization had adopted a rule for the assessment of real estate generally whereby it was to be assessed at "two-thirds of the fair cash market value" and not the "full cash market value," and since the Lumber Company had proved, without dispute, before the Board what two-thirds of its values were, and since the Board "had knowingly, arbitrarily and fraudulently" raised its lands above two-thirds of their value, the Board had unlawfully discriminated against the Company and the assessment was void. The Court of Civil Appeals disre-
621 garded the supposed effect of the "two-thirds rule" adopted by the Board, it not having been shown upon the trial of the case that the lands were, as a matter of fact, assessed too high. The Court said: "The question really was first whether it was overvalued or whether the court (Board) discriminated against appellant as complained of, and these facts had to be established before the court trying this case." That is to say, it was held that the plaintiffs had

to show that as a matter of fact their lands did not have the value ascribed to them by the Board; the mere fact of the existence of the "two-thirds rule" was insufficient, in the absence of a showing that the results, not the manner of reaching the results, had produced injury; in order to show injury from the results, plaintiffs were compelled to show that the lands really had no such value as found for them.

X.

Since the State Tax Board, and no other official or body, representing the State of Texas as a whole is not a party to the litigation; since the State Tax Board has long since performed all of the duties laid upon it by law, and has certified the results of its valuations to the various counties, and had done so long before the filing of this suit; and since it was the duty of the appellants to enjoin said Board from certifying said valuations before it did so, if there was error therein so that such error could be corrected; and since appellants attempted in the Federal Courts to secure such injunction and abandoned the attempt; and since the result of a successful attack upon such valuation in this suit to which only the taxing authorities of Harris county are parties defendant would nullify the valuations certified by the State Tax Board to some thirty-six other counties and thus deprive each and all of such counties of such taxable values and also deprive the State of the whole of such taxable values, there is a fatal defect of parties, and the appellants are concluded from making such attack in this case, and, therefore, the Court of Civil Appeals errer in reversing the judgment of the Trial Court and in rendering judgment for appellants.

622 Statement.

Neither the State of Texas, nor any of the interested counties, are parties to this cause. The State Tax Board is not a party, nor is any state officer a party, nor are the officers of any county, except Harris county, parties.

Authorities.

Texas Co. vs. Daugherty, 160 S. W. 129;
Renshaw vs. Arnett, 158 S. W. 1197;
Raley vs. Bitter, 170 S. W. 857;
State, ex rel. Stone vs. Christian County Bank (Mo.), 136 S. W., 335;
And cases cited on page 336, 136 S. W.;
Bradford vs. Westbrook, 88 S. W. 382.

XI.

The basis of the equitable relief prayed by appellants being alleged discrimination against them and in favor of other property taxpayers in Harris county, and thus an alleged violation of the uniformity

and equality clauses of the Constitution being presented, and it being true, as found by the trial court, that the whole of appellants' property, taxable in Harris county, has not been valued for taxation at a greater proportion of its value than other property in the county generally, no right to equitable relief has been shown.

Statement.

The pleadings of appellants upon this branch of the case are found in subdivision III of the petition beginning on page 23 of the transcript. It is alleged that there exists a scheme and custom, and the same has existed for a number of years, in Harris county, whereby the taxing officials of that county "permitted that the property taxable within the county should be assessed, valued, equalized and placed on the tax rolls for taxing purposes at not exceeding 38 per cent of its true value and of its true cash and market value, and far below the same, with the exception that the intangibles, if any, of railroads should be valued as certified by the State Tax Board, and with the further exception that large amounts of money and of notes and accounts, stocks, bonds and loans, and bills receivable, household furniture subject to taxation and other personal property were understood, agreed and permitted not to be taxed at all, and that
623 taxation thereof was purposely permitted to be avoided, except as to relatively small amounts, the system being to permit this class of capital to escape taxation, and with the further exception that the tangibles of this railroad taxable in this county were assessed and valued at a higher rate than the rate adopted for the valuation of the tangibles of other property taxable in this county; and that not less than one-half of the property in this county, subject to taxation, thereby escapes all taxation," and that the acts of the local officials, in this connection, "were intentional and arbitrary," and thereby appellants were "unjustly, arbitrarily and illegally discriminated against." (Tr. pp. 23-24) Wherefore, appellants prayed that the valuation of intangibles apportioned to Harris county be reduced to the proportion thereof corresponding to the proportion of assessed to real value of other property in the county. (Tr. 6. 24).

The appellees answered this branch of the case as follows:

With a general denial. (Tr. p. 40). With further answers, as follows:

"They especially deny the material allegations contained in subdivision III of said petition.

"They especially deny that the intangible values of the International & Great Northern Railway Company, as found by the State Tax Board, are in excess of the true value of its intangible assets, but, on the contrary, they say the real sum of the values is what is called the 'physical properties' and of what is called 'intangible assets' far exceed the sum of the total assessments of said properties, and that the real value of what is called the intangible assets far exceed the amount thereof found by the State Tax Board.

"They especially deny that there was any scheme or plan in exist-

ence in this county whereby 'it was agreed and understood or permitted that the property taxable within the county should be
624 assessed, values equalized and placed on the tax rolls for taxing purposes at not exceeding 38 per cent of its true value and of its true cash and market value, with the exception that the intangible, if any, of railroads should be valued at their full value, as certified by the State Tax Board, and with the further exception that large amounts of money and notes and accounts, bonds and loans, and bills receivable, were understood, agreed and permitted not to be taxed at all, and the taxation thereof was purposely permitted to be avoided, except as to relatively small amounts, the system being to permit this class of capital to escape taxation, and with the further exception that the tangibles of this railroad taxable in this county were assessed and valued at a higher rate than the rate adopted for the valuation of the tangibles of other property, taxable in this county; and that not less than 38 per cent of the property in this county, subject to taxation, thereby escapes all taxation,' as alleged in sub-paragraph (1) of subdivision III of plaintiffs' petition, and especially deny material facts in said subdivision alleged, and say that, on the contrary, that the property of the plantiffs, including their intangible assets, were not assessed for taxation in greater proportion to their real values than other property in the county was assessed, and the intangible assets of the plaintiffs, considered alone, were not assessed at a great- proportion of their real values than other property in the county, and, therefore, that plaintiffs were not discriminated against as alleged by them.

"Defendants say in the alternative, that if it should be true that such a scheme and purpose did exist, the plaintiffs themselves were and are parties to it, helped to create it and assisted in carrying it out for the purpose of securing a grossly inadequate valuation and assessment of their properties in said county, and thereby, or in some other manner, did secure a grossly inadequate valuation and assessment of their properties in the county and an assessment thereof
at a value much less than the real value thereof, and an
625 assessment thereof at a value much less than said 38 per cent of the real value thereof, and that as a result of such conduct upon the part of plaintiffs said county and its taxing subdivisions, and the State of Texas have been or will be deprived of a great amount of revenue to which they are entitled from plaintiffs. And in this connection defendants show unto the court the following:

"First. That by laws of the State the plaintiffs were required to file a statement or list, under oath, of their properties in said county therein stating the 'full and true value' thereof, the purpose of said statement being to assist the county taxing authorities in arriving at the correct assessment of such properties, and to furnish data therefor; the plaintiffs knew that the taxing authorities of said county were not in a position to know the 'full and true value' of railroad property, and that they would be, and were, compelled to accept, or rely upon, such statement, and they did, at least to a large extent, rely upon the truthfulness thereof.

"Second. That the plaintiffs did file such a statement under oath stating the value of such properties in such county to be, approximately, the sum of about $964,275, and such taxing authorities were compelled to, and did, rely at least to a large extent, upon the accuracy of such statement, and the contents thereof and the same resulted in the assessment of such properties in said county at $823,672 (about), which sum is much less than the 'full and true value' thereof, and which is less than 38 per cent of the 'full and true value' thereof.

"Third. That the plaintiffs well know, or should have known, at the time that such statement was filed, and at the time that such assessment was made, that the statement of the value of such properties in such county was much less than the 'full and true value' thereof, and was less than 38 per cent of the full and true value thereof, and that such statement was likely to and probably would and did, to a large extent, cause such properties to be assessed for taxation at an amount much less than the 'full and true value' thereof.

626 "Fourth. That, therefore: (*a*) The plaintiffs have not done, or offered to do, equity in the premises, and do not come into this court seeking equity with clean hands; and

"(*b*) By reason of the premises the plaintiffs are now estopped to plead the matters set forth in subdivision III of their petition or to secure any relief theron.

"Wherefore, defendants pray that the plaintiffs be held estopped to plead the matters set forth in their said petition and to secure any relief therein, and that this cause be dismissed, and especially so as to the third subdivision of said petition." (Tr. pp. 40-43.)

The findings of fact and conclusions of law filed by the trial court upon this branch of the case are as follows:

"Conclusions of Fact.

"In making the findings of value as hereinafter stated, I have adopted the valuations of the properties of plaintiffs made by the Railroad Commission of Texas from time to time as the basis, believing from the evidence that it is just to do so; in doing so, however, I realize from the evidence that the values of real estate along the lines and in the neighborhoods of the plaintiffs' properties have substantially increased in value since the dates of such valuations by the Railroad Commission, and if it should be proper to allow, therefore, as to right-of-way and other real estate belonging to plaintiffs the valuations found therefor by me would be substantially increased; I have departed from the Railroad Commission's valuations of real estate in certain instances hereinafter noted and allowed for the values of certain real estate as they existed on or about January 1, 1915, minus the values allowed therefor by the Railroad Commission, for the reason, in such cases, such real estate is reason-

ably adapted to use for general commercial purposes and the possibility of its use is not confined to railway purposes.

"The physical properties of plaintiffs in Harris county,—including the rolling stock apportioned to said county on the mileage basis,—were rendered and assessed for the year of 1915 at
627 the total sum of $1,106,105.00.

"The valuations placed by the Railroad Commission of Texas on the same properties aggregated the sum of $2,009,822.09, and including rolling stock apportioned to Harris county, aggregated the sum of $2,331,822.00.

"Since the valuations by the Railroad Commission additions and betterments have been made to said properties in said county to the extent of approximately $400,000.00.

"In adopting the above figures, as representing the value of said properties in said county on January 1, 1915, I have allowed nothing for increase in values of road, road-bed, structures, or real estate,—except the particular items of real estate next mentioned,—although the evidence tends to show that abutting property, and real estate generally, along the route of the line of plaintiffs' railroad, have substantially increased in value since the dates of the Railroad Commission's valuations.

"The plaintiffs hold certain real estate in and near the city of Houston which is suitable for general uses and purposes and all of which is not actually being used for pure railway purposes, reasonably calculated for railroad purposes and reasonably held therefor, and as to this real estate, I allow additions to the above figures measured by the difference of the amounts allowed by the Railroad Commission in its valuations therefor and their value about January 1, 1915:

"I allow $208,380.00 difference between present value of 94.6 acres of land on and near the Turning Basin and value allowed by the Railroad Commission.

"I allow $90,000.00 for such difference with respect to a 19.9-acre tract just north and adjoining Buffalo Bayou in the city of Houston,—same being shown on Engineer's Map No. 38-*b* in evidence; I also allow $100,000.00 for such increased value of portions of parcels 4, 4*a*, 3, 8, shown on Engineer's Map No. 38-*b*.
628 "I allow $75,000.00 for such increased value for certain real estate marked "D" on Engineer's Map S-1-*a*.

"The total value found by me on these bases of the tangible properties of plaintiffs in Harris county on January 1, 1915, and subject to taxation is, therefore, the sum of $3,205,202.09. This property was rendered and assessed for taxation at the sum of $1,106,105.00, or at about 34 per cent of its real value as found. The intangible values apportioned to Harris county by the State Tax Board is the sum of $603,227.44, making the total taxable values for the year of 1915 the aggregate sum of $3,809,379.00, which aggregate values were assessed at the sum of $1,709,332.00, of about 45 per cent of their values as found. If the aggregate of these values,—that is, of tangibles, intangibles and rolling stock,—had been assessed at 50

per cent of their said values they would have been assessed at the sum of $1,904,689.00.

"Conclusions of Law.

"The evidence shows that the tangible properties of the plaintiffs subject to taxation in Harris county were for the year of 1915 assessed at a proportion of their true values lower than the proportion of assessed to true values of property generally, and sufficiently lower to more than make up for any discrimination against plaintiffs by reason of their intangibles having been assessed at full value, if they were so assessed; in other words, the total properties of plaintiffs in Harris county,—tangible, rolling stock and intangible,—as assessed for 1915, were assessed at less than 50 per cent of their real true values, while other property in the county generally was assessed at at least 50 per cent of its true value; I conclude, therefore, that plaintiffs have not shown themselves entitled to the relief prayed for by reason of the allegations contained in subdivision III of their petition." (Tr. pp. 83-86.)

Briefly to restate from the record the reason why it was held that appellants had not shown themselves entitled to relief on this branch of the case: (1) Property generally in the county
629 was assessed for taxation for the year in question at 50 per cent, or more, of its value; (2) Appellants' property, including physicals, rolling stock and intangible value certified by the State Board, of aggregate value of $3,809,379.00, was actually assessed at $1,709,332.00, or at about 45 per cent of its value. If it had been assessed 50 per cent of its value,—as other property was assessed,—it would have been assessed at the sum of $1,904,689.00, instead of at the sum of $1,709,332.00.

Appellants, in their brief, make no attack upon the findings of fact or conclusions of law filed by the court, and we, therefore, assume that it is unnecessary to point out the evidence sustaining the findings. Some of the evidence upon which these findings were made is set forth on pages 55 to 66 of appellees' brief in this case, and reference is here made thereto.

Authorities.

M. K. & T. Ry. Co. vs. Hassell, 123 S. W. 190;
C. R. I. & G. Ry. Co. vs. Ratliff, 177 S. W. 571.

Wherefore, appellees pray that the judgment rendered by this court in this cause on the 21st day of June, 1917, be set aside, and that the judgment of the District Court of Harris County be in all things affirmed

In the alternative, and in the event the Court does not believe that the judgment of the District Court should be in all things affirmed, then appellees pray that the same be reformed as may be required by the facts of record, and as so reformed that it be affirmed.

Appellees represent that Messrs. Wilson, Dabney & King, whose residence and post-office address is the city of Houston, Harris county, Texas, are the attorneys of record for appellants herein, and upon them service hereof may be had for appellants.

630 Respectfully submitted,

B. F. LOONEY,
Attorney General;
LUTHER NICKELS,
Assistant Attorney General;
SEWAL MYER,
Attorneys for Appellees.

Endorsed: No. 7339. In the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, Texas. James A. Baker, Receiver, et al., appellants, vs. Karl L. Druesedow et al., appellees. Appellees' Motion for Rehearing. B. F. Looney, Attorney General. Luther Nickels, Assistant Attorney General, Sewal Myer, Attorneys for Appellees. Filed in Court of Civil Appeals, Jul. 12, 1917. H. L. Garrett, Clerk. Filed in Supreme Court Nov. 8, 1917. F. T. Connerly, Clerk. With App. No. 10577.

Opinion on Motion for Rehearing.

Filed in the Court of Civil Appeals Oct. 18, 1917.

No. 7339.

JAMES A. BAKER and CECIL A. LYON, Receivers, Appellants,

vs.

KARL L. DRUSEDOW et al., Appellees.

Appeal from the District Court of Harris County.

On Motion for Rehearing.

Opinion on Motion for Rehearing.

Appelles in a motion for rehearing filed by them very earnestly contend that we have erred in holding that the evidence in this case fails to show that the International & Great Northern Railway Company has any intangible property or intangible values subject to taxation under the laws of this state. No attempt is made in the motion to justify the holding of the tax board that the so-called "rule of three" formula used by the board for the purpose of ascer-
631 taining the value of the stock of the Railway Company demonstrated that the stock is worth the amount found by the board. It is urged, however, that the record does not justify our conclusion that the board relied solely upon the application of the formula to show the value of the stock, and that if the formula be

discarded there is evidence to sustain the finding of the board as to the value of the stock and that the Railway Company owns intangible property in this state of more than $10,000,000.00 in value.

We cannot agree with either of these contentions. We think the record as a whole shows conclusively that the board relied solely upon the mathematical result obtained by the application of the formula in fixing the value of the stock of the Railway Company, and the intangible values were found by the board by deducting from the aggregate of the value of the stock so found and the value of the lien indebtedness of the company, the value of its tangible property. Mr. Bagby, State Tax Commissioner, the only member of the State Tax Board who testified in the case, stated that in fixing the intangible values of the Railway Company the board considered all the evidence before it, but he failed to state what evidence the board had before it showing or tending to show that the Railway Company had any intangible value, and no such evidence was introduced upon the trial. He insisted that the use of the formula, as shown in our main opinion, was a rational and scientific method of arriving at the true value of the stock of the Railway Company. Upon cross-examination he was asked how stock that had never paid a dividend could be worth 2.68 times its face value, and if the board did not fix the value of the stock by applying the formula, and he replied: "Yes, sir; we did on the formula and stuck to the formula." As stated in our main opinion, the true value of the stock could not possibly be ascertained by the method or formula used by the tax board, and there is no evidence to sustain a finding that the stock was worth more than its face value. This being so, no in-
632 tangible value is shown by subtracting the value of the tangible property of the company from the sum of the value of the stock and lien indebtedness of the company. In our main opinion we say that the value of the tangible properties of the Railway Company fixed by the State Railroad Commission was "shown by the undisputed evidence to be their true value." This statement is not accurate. What we had in mind and intended to say was, that the undisputed evidence shows that the value of the tangible properties of the Railway Company was not less than the amount fixed by the Railroad Commission. The only evidence tending to show that it was worth less were the tax rendition values, made by the company. The great preponderance of the evidence shows that the value was largely in excess of the amount fixed by the Commission.

Unless we adopt appellees' theory, that the tax board is authorized under the intangible tax statute of this state to assess as intangible values the value of tangible property of a railroad in excess of the value for which the tangibles are assessed for taxes, or that such board can make an "arbitrary" finding of intangible values, the finding of the board that the International & Great Northern Railway Company had intangible property of any value at the time the assessment in question was made cannot be sustained. We can not adopt either of these theories of appellees, and feel constrained to adhere to the conclusions stated in our main opinion.

Appellants have presented a motion asking us to correct that por-

tion of our main opinion in which we state that there was evidence to sustain the finding of the trial court, "that taking the Railroad Commission's valuation of the physical properties of the railway in Harris county as a basis, the total value of the property assessed against the railway in Harris county, including the intangible values, did not amount to a greater per cent of the true value of the tangible property of the railway then the per cent at which other tangible property in said county was assessed for taxation."

633 The ground on which appellants complain of this statement is that the evidence upon which the trial judge based his finding as to the value of the tangible property of the railway in Harris county was the testimony of Mr. Parker as to the cost of reproduction of the tracks, depot building, and other permanent improvements used by the railway in the operation of its road in said county, and the testimony of the witness Kelly as to the value of real estate abutting upon that owned and occupied by the railway. The contention is made that the testimony of neither of these witnesses was admissible for the purpose of showing the value of the railway property, and that the finding of the trial court based upon such testimony, which was admitted over the objection of appellants, was without evidence to support it.

We did not in our main opinion pass upon appellants' assignments complaining of the admission of the above stated testimony, and we do not find it necessary now to decide the questions presented by said assignments.

The trial court expressly states in his findings of fact that he did not consider the testimony as to the value of abutting property in fixing the value of land held and used by the railway company for railway purposes only, but only considered such testimony in fixing the value of land owned by the railway which is not now used for such purposes and may never be so used and which "is reasonably adapted to use for general commercial purposes." We think this testimony could be properly considered in finding the value of real estate owned by the railway company but not used for railway purposes and which may never be needed for such use. There was testimony other than that of Mr. Parker above stated which sustains the findings of the trial court as to the value of the railway tracks, buildings and other superstructures in said county and we cannot say that the findings of the court were based in whole or in part upon the testimony of Mr. Parker.

634 Appellants further complain of our holding that the intangible tax statute, under which the assessment complained of in this suit was made, is not unconstitutional on the ground that it authorizes a double assessment of intangible property. We do not care to add anything to what was said in our main opinion in overruling the assignment presenting this question.

Our conclusion is that both motions should be refused, and it has been so ordered.

R. A. PLEASANTS,
Chief Justice.

Endorsed: No. 7339. In Court of Civil Appeals, Galveston. James A. Baker & Cecil A. Lyon, Receivers, Appellants, vs. Karl L. Druesedow et al, Appellees. Opinion on Motion for Rehearing. Pleasants, Chief Justice. Recorded Oct. 19, 1917. Filed in Court Civil Appeals Oct. 18, 1917. H. L. Garrett, Clerk. Filed in Supreme Court, Nov. 8, 1917. F. T. Connerly, Clerk. With App. No. 10577.

Order Overruling Motion for Rehearing.

Oct. 11th, 1917.

No. 6914/7339.

JAS. A. BAKER, Recr., et al., Appellant-,

vs.

KARL L. DRUESEDOW et al., Appellee-.

From Harris County.

Order Overruling Motion for Rehearing.

"It is ordered that appellees' motion for rehearing be refused."

635 PROCEEDINGS IN THE SUPREME COURT OF THE STATE OF TEXAS.

Petition for Writ of Error.

Filed in Court of Civil Appeals November 1, 1917.

Filed in Supreme Court of Texas November 8, 1917.

In the Supreme Court of the State of Texas.

No. ——.

KARL L. DRUESEDOW et al., Plaintiffs in Error,

vs.

JAMES A. BAKER, Receiver, et al., Defendants in Error.

Petition for Writ of Error.

To the Supreme Court of Texas:

This was a suit instituted in the district court of Harris county, Texas, Eightieth Judicial District, by James A. Baker et al., as receivers of the International & Great Northern Railway Company, and by said railway company, against Karl L. Druesedow, as tax

collector of Harris county, and against the members of the commissioners court and county judge of said county, in which said plaintiffs sought judgment declaring the valuation of the intangible properties of said railway company and receivers as made by the State Tax Board, operating under Chapter 4, Title 126, Revised Statutes of 1911, for the year of 1915, to be void, and also to be excessive, and praying that such valuation be set aside in whole, or, in the alternative, that the same be reduced by the court, and praying for an injunction against said defendants restraining the collection of taxes levied upon such valuation.

The State Tax Board, nor any of the members or officers thereof, nor the State, nor any other officer representing the State, nor any of the other counties or county officials interested in such valuation, were not made parties to the suit.

636 The plaintiffs also alleged that the properties of other taxpayers in Harris county, generally, were undervalued, so that this alleged fact, together with the alleged fact that the intangible properties of plaintiffs were assessed at full value produced an unconstitutional discrimination against plaintiffs; thereupon they prayed for an injunction against the defendants restraining them from collecting taxes upon such intangible valuation in excess of the proportion at which other property generally was assessed.

The defendants filed a plea in abatement, and also a demurrer, and an answer, in due course, alleging that there is a fatal lack of parties to warrant the attack upon the valuation as made by the State Tax Board, because the State of Texas and thirty-six counties,—other than Harris county,—were substantially interested in the maintenance of such valuation, and their rights would be destroyed or impaired by any judgment setting aside such valuation in whole or part, and because these interested parties, nor their representatives, had not been made parties to this suit. This plea and demurrer and answer were overruled by the trial court, and its action, in this respect was sustained by the Court of Civil Appeals.

The defendants also denied that there had been any excessive valuation made by the State Tax Board, but said that, as a matter of fact, the valuation as made was much less than the real value of plaintiffs' properties subject thereto. They also denied that such valuation was discriminatory and that there was anything to impeach the valuation as made by the board. Upon this feature of the case, the trial court found as a fact, and concluded as a matter of law, that the valuation made by the State Tax Board was not excessive, that there was nothing in the evidence to indicate bad faith or fraud in the making of the same, and that the same, under the record, was unimpeached. The Court of Civil Appeals, upon these issues, overruled the trial court, and held that the plaintiffs had no intangible values subject to valuation by the State Tax Board, and held that, while the board had not been guilty of

637 intentional wrongdoing or bad faith, it had pursued methods of calculation which rendered its valuation void.

The defendants also denied that the property of other taxpayers in Harris county, generally, had been under-assessed, and denied

that the plaintiffs' properties in said county, even when the intangible valuation allotted to said county was included had been assessed at a greater proportion of their true value than the assessments upon other property generally; but, on the contrary, they said that the assessment made upon plaintiffs' tangible and intangible properties, in the aggregate, was at a much less proportion of their true values than the assessments upon other properties in the county generally. The trial court, upon the evidence before it, made findings of fact upon this issue to the following effect:

What plaintiffs call their "physical properties" in Harris county had a value of at least $3,205,202.09, which was rendered and assessed for the year in question at only $1,106,105, or about 34 per cent.

The proportion of the State Tax Board's valuation allotted to Harris county for the year in question was $603,227.44, making the total assessment of all of plaintiffs' properties in the county the aggregate sum of $3,809,379, which total valuation was actually assessed at only $1,709,332, or about 45 per cent.

Other property, generally, in the county was assessed at least 50 per cent of their values.

If plaintiffs' properties in the county, as a whole,—physical and "intangible,"—had been assessed at 50 per cent, they would have been assessed at the sum, at least, of $1,904,689, whereas they were only assessed at the sum of $1,709,332.

Upon these findings of fact the trial court concluded as a matter of law,—under the authority of M. K. & T. vs. Hassell, 123 S. W., 190, and C. R. I. & G. vs. Ratliff, 177 S. W., 571,—that
638 plaintiffs had not shown themselves entitled to the relief prayed, and rendered judgment against them, and rendered judgment in favor of Druesdow, tax collector,—upon his cross-bill,—for the amount of the taxes due upon the valuation of $603,-227.44,—the taxes upon the $1,106,105, already having been paid.

The judgment of the trial court was reversed by the Court of Civil Appeals, and judgment was there rendered for plaintiffs. A motion for rehearing,—presenting all of the questions here presented,—was, in due time, filed by defendants, which motion was in all things overruled by said Court of Civil Appeals on the 11th day of October, 1917, and your petitioners apply for a writ of error.

Grounds of Jurisdiction.

The case is one in which the jurisdiction of the Court of Civil Appeals is not final under Article 1591, R. S., 1911, or any other law, and the amount in controversy exceeds the sum of $1.000.

The Supreme Court has jurisdiction, as your petitioners conceive and here aver, because of each and all of the following reasons, to-wit:

1. The case involves the construction and validity of a statute of the State, towit: Chapter 4, Title 126, R. S., 1911.

(*a*) In this connection petitioners show unto the court that said Chapter 4, in Article 7416 et seq. thereof, required the defendants

in error to file with the State Tax Board, for its use and consideration, a sworn statement showing, among other things, the "true value of all their tangible property," which statement was filed showing such value to be the sum of $26,026,810.78, exclusive of "rolling stock," which was shown to be of the assessed value of $2,168,906,—making the total value of tangible properties as shown by such report to be the sum of $28,195,716.78. This report was considered by the board prior to making its valuation. Article 7420 of said statute required the State Tax Board to find as a fact the value of all the tangible properties of defendants in error, and, in doing so, to consider the aforesaid report; the tax board, pursuant to such statute and said report, and all other evidence before it, found
639 the value of the tangible properties to be the sum of $28,372,810. Said statute commanded the tax board to find as a fact, also, the value of the entire properties of the defendants in error, and from the value of the entire properties to deduct the value found for the tangible properties, and to fix the remainder as the valuation of the so-called "intangible properties." This was done by the board. The defendants in error contend, and the Court of Civil Appeals held, that the State Tax Board committed such an error in taking the sum of $28,372,810 as the value of the "tangible properties,"—although the report aforesaid showed such values to be slightly less,—as to render its final valuation void. Plaintiffs in error contend that the State Tax Board, by the terms of the statute, were fully authorized to accept the statements made by defendants in error in said report as the basis for their finding of tangible property values, and that in doing so the board committed no error; defendants in error contend, and the Court of Civil Appeals held in effect, that such a construction of the statute would render it void.

Defendants in error also contend that the statute is void because they say it necessarily results in double taxation.

(*b*) Although said statute expressly authorizes the State Tax Board to adopt any method of calculation it may think just, from the evidence before it, in finding values, and although the statute expressly authorizes the board to take the statements made in the reports made by plaintiffs in error as correct, the defendants in error contend, and the Court of Civil Appeals in effect held, that there are but two methods permitted by the statute for the findings by the board, to wit: First, by adding together the values of the capital stock and the mortgage indebtedness of the railway company and taking the aggregate as the value of the "entire properties," and by subtracting therefrom the value of the tangible properties and taking the remainder as the valuation of the "intangible properties"; and, second, by capitalizing the net earnings of the carrier at a reasonable rate of interest, whereas, the statute expressly authorizes the board to
640 adopt any method which all the information before it may show to be just.

2. The case, as already shown, involves the revenue laws of the State and the construction and validity thereof.

3. The Court of Civil Appeals at Galveston in this case held differently from prior decisions of the Court of Civil Appeals at Dallas, and prior decisions of the Court of Civil Appeals at Amarillo, and prior decisions of the Supreme Court in denying writs of error to the decisions referred to, upon vital and substantial questions of law involved in this case.

In this connection petitioners show unto the court the following:

(*a*) In the case of M. K. & T. Ry. Co. of Texas vs. Hassell, 123 S. W., 190, the Court of Civil Appeals at Dallas held that the railway company, in a case analogous to this, was not entitled to such relief as was granted herein by the Court of Civil Appeals at Galveston, since it appeared (in the Hassell case) that the aggregate assessment of the railway company's tangible and intangible properties in Grayson county was $2,266,938, while their real value amounted to the sum of $3,064,876, since, therefore, the railway company's assessment was slightly less than 75 per cent of the aggregate value, and since other property generally was assessed at 75 per cent of its real value. A writ of error was denied by the Supreme Court in the Hassell case.

(*b*) In the case of C. R. I. & G. Ry. Co. vs. Ratliff, 177 S. W., 571, the Court of Civil Appeals at Amarillo held that the railway company, in a case analogous to this, was not entitled to such relief as was granted herein by the Court of Civil Appeals at Galveston, since it appeared (in the Ratliff case) that the aggregate assessment of the railway company's tangible and intangible properties in Carson county was only the sum of $515,390, while their real value amounted to at least the sum of $635,677.05, and since it appeared that there was evidence to indicate that other property in the county, generally, had not been assessed at a lower proportion. A writ of error was denied.

641 (*c*) In this case the evidence uncontradictedly shows, and the trial court found as facts, that the aggregate value of the tangible and intangible properties of the defendants in error in Harris county was more than the sum of $3,809,379; that they were assessed at only $1,709,332, or about 45 per cent, whereas other property, generally, in the county was assessed at at least 50 per cent of its value, and if the entire properties of the defendants in error in Harris county had been assessed at 50 per cent of their value they would have been assessed for the sum of $1,904,689 instead of $1,709,332. Notwithstanding these findings of fact, and the conclusion of law based thereon by the trial court, and notwithstanding the evidence amply supports the findings, and notwithstanding the fact that the findings of fact are sustained by the Court of Civil Appeals at Galveston, said Court of Civil Appeals reversed the judgment of the trial court based thereon and rendered judgment for defendants in error; thereby petitioners aver, bringing itself in conflict with the decisions aforecited.

4. The Court of Civil Appeals committed an error of law in holding that the defendants in error owned no property subject to valuation by the State Tax Board, and in holding that the evidence shows such to be the fact,—which errors are of such importance to the jurisprudence of the State as to require correction by the Supreme Court.

5. Various errors of law were committed by the Court of Civil Appeals at Galveston of such substantial importance to the jurisprudence of the State as to require the correction thereof by the Supreme Court. And in this connection petitioner shows unto the court the following, to-wit:

(*a*) Each of the matters set forth in each of the paragraphs, numbered 1 to 3, inclusive, and in each of the subdivisions thereof, immediately above, petitioner avers, presents such an error of law as to require correction by the Supreme Court.

(*b*) The State of Texas, and each county through which the line of railway of defendants in error runs, are vitally and ma-
642 terially interested in the subject matter of this suit, and if the judgment of the Court of Civil Appeals is allowed to stand they, and each of them, will be thereby deprived of a substantial amount of revenue; but neither the State of Texas, nor any officer representing it, nor either of such counties, -ther than Harris county,—nor any officer representing them, are parties to the suit, and had no opportunity to defend their interests.

Again, the State Tax Board, whose solemn act and judgment is destroyed by such judgment of the Court of Civil Appeals, is not a party to the suit, and its power to revise its judgment, if the original valuation is wrong or invalid, has been destroyed.

Petitioners say that the valuation made by the State Tax Board, by reason of the premises, has been attacked and overturned by a collateral proceeding, and thereby the rights of the entire State and of thirty-six counties have been destroyed or materially impaired without due process and in a collateral proceeding in which they were not parties.

It is apparent also that defendants in error had full opportunity to attack such valuation in a direct proceeding to which the State Tax Board could have been made parties and thereby the rights of all parties could have been protected, and the valuation attacked, if wrong or illegal for any reason, could have been corrected; but that notwithstanding such opportunity, the defendants in error waived such opportunity, and now propose to have such valuation, and the rights growing out of it, destroyed in a collateral proceeding. And this the Court of Civil Appeals holds that they may do.

Petitioners say that such a decision by the Court of Civil Appeals involves a substantial error of law of such material importance to the jurisprudence of the State as to require correction by the Supreme Court.

The following assignments of error were each and all presented to the Court of Civil Appeals in the motion for rehearing filed by your petitioners:

643 First Assignment of Error.

The Court of Civil Appeals erred in holding and deciding that the appellants (and the I. & G. N. Railway Company) at the time of the making of the valuation of their intangible assets by the State Tax Board for the year of 1915, had no property subject to such valuation or subject to taxation under the law under which said tax board operated, and in holding that the evidence in this case shows such to be the fact, and in reversing the judgment of the trial court and rendering judgment for appellants by reason of such holdings.

Statement.

Articles 7515, 7518 and 7520, Revised Statutes, 1911, require railway companies to list "all their real and personal property" in the counties where situated "at the full and true value"; Article 7517 requires this "listing" to be sworn to. Pursuant to these statutes appellants listed, under oath, their physical properties (exclusive of rolling stock) in all the counties in which they operated at a total valuation of "about $14,000,000" as its "full and true value." (Statement of Facts, p. 165.)

Article 7525 requires appellants, under oath, to list their entire rolling stock at the "true and full value" thereof; pursuant to this statute the rolling stock was so listed as having a value of $2,168,906. (Statement of Facts, p. 165.)

The above valuations were testified to by Mr. Holder, land and tax agent for appellants. (Statement of Facts, p. 165.) We have here, then, a sworn valuation of purely "tangible properties" by appellants themselves (who, necessarily, were in the best position of anybody to classify their entire properties as between "tangibles" and "intangibles"), aggregating $16,168,906. And of this valuation of "tangibles" the members of the State Tax Board knew.

Now, the appellants were required by the statute each year to make a sworn report to the State Tax Board showing, among other things, "the true value of all the tangible property owned by such company in each of the counties of the State." These re-
644 ports were made for each year since 1907, and the report for the year ending December 31, 1914, showed such value of the "tangible properties" to be the aggregate sum of $26,026,810.78 (Statement of Facts, p. 88), exclusive of rolling stock, which was rendered at $2,168,906 (Statement of Facts, p. 165),—a total valuation of "tangibles" of $28,195,716.78. The State Tax Board took the sum of $28,372,810 as the value of the tangibles (Statement of Facts, p. 17), thus exceeding appellants' valuation of this class of property by the sum of $204,904. This necessarily decreased the valuation of intangibles by a like amount. Appellants filed another affidavit with the board showing the value of their physical properties, including rolling stock, to be the sum of $28,000,000. (Statement of Facts, p. 350.) Mr. Bagby, chairman of the board, testified that the board took these figures reported and sworn to by

appellants as the basis of the board's finding of the value of the "physical properties." (Statement of Facts, p. 350.) That these figures were reported, under oath, to the board as the true value of the physical properties is nowhere contradicted. The report itself is in the record at page 82 to 95 of the statement of facts, sworn to by Mr. W. J. Werner, auditor for appellants.

This report also showed that the total value "assessed" in all the counties, exclusive of rolling stock, was the sum of $27,966,444. (Statement of Facts, p. 88.) But this sum included the assessments on the valuation of intangibles as made for the year of 1914. (Statement of Facts, pp. 164-65.) The valuation made by the tax board for 1914, and included in the sum just mentioned, was approximately $14,000,000. (Statement of Facts, p. 165.) And this the board knew. (Statement of Facts, pp. 164-165.) The value of "rolling stock" assessed for all the counties, as shown by the report, was $2,346,992. (Statement of Facts, p. 89.) So that the "assessed value" of all physicals for 1914 was approximately $16,000,000.

The only other factor to be considered by the board was the "entire value of the property" of appellants. The minimum "entire value" for the property shown by the record is the sum
645 of $32,471,027.05 (the valuation of the Railroad Commission of Texas), plus $1,542,065.02 additions and betterments made since said valuation by the Railroad Commission, or an aggregate minimum value of $34,013,092.07; this is alleged in the petition of appellants, as shown by the opinion filed in this case, and there is not a scintilla of evidence in the record to show that the value of the "entire property" is less than these figures.

The par value of all lien indebtedness of appellants and the railway company, as shown in the petition, and in the opinion of the Court of Civil Appeals, was $27,332,000; this included receivers' certificates to the amount of $600,000. (Statement of Facts, p. 98.) The non-lien indebtedness (minus the $600,000 receivers' certificates just mentioned) was $3,340,867. (Statement of Facts, pp. 97-98). The total indebtedness was, therefore, $30,672,867. The indebtedness (secured and unsecured) deducted from the minimum value shown for the "entire properties" ($34,013,092.07) leaves $3,340,225.07. This remainder certainly represents the minimum value of the stock.

The Railroad Commission includes in its final valuations 6 per cent of the physical values found as a "franchise value". (Statement of Facts, pp. 42, 373.) The appellants, before the tax board, expressly refused to admit the correctness of the valuations made by the Railroad Commission. (Statement of Facts, pp. 43-44.)

The State Tax Board found the "entire value" of all the properties of appellants to be the sum of $39,116,033. (Statement of Facts, p. 17.) Appellants nowhere in their petition or in the evidence have denied that the total value of all their properties was less than this figure. Of course, they say that the intangible value and the value of the stock is excessive, but no denial can be found of the proposition that there whole properties were worth less than the

amount found by the State Tax Board. But there is ample evidence to show that their entire properties were worth at least $39,116,033. And as to this we call attention to the following facts,—shown in large part by the records of appellants,—and nowhere contradicted:

646 The actual money invested in "road and equipment" up to June 30, 1915, was the sum of $46,502,041.55. (Statement of Facts, p. 130.) Of course, some elements of the property in which this investment was made from time to time were subject to depreciation; but other elements were at the same time subject to appreciation,—for instance, the value of a roadbed increases with use and time, the value of this appreciation (called "seasoning") is estimated by Mr. Freeman for the I. & G. N. at at least $1,000,000. (Tr. pp. 64-65). These elements of "appreciation" are not set up in the books of the appellants, but all "depreciation" is to taken account of, and, after allowing for "depreciation" the balance sheet of appellants states the value of "road and equipment" to be $37,243,133.44 as of June 30, 1914. (Statement of Facts, p. 243). These figures are not only carried on the books of the company, but they were reported under oath to the Railroad Commission of Texas and to the Interstate Commerce Commission. Appellants have not challenged the correctness of the figures. If the total lien and non-lien indebtedness be subtracted from this amount it leaves $6,570,266.44. If the figure (28,372,810 dollars) used by the board as the value of the tangible properties be deducted from this sworn statement of value by appellants, it leaves $8,870,323.44.

Mr. T. J. Freeman, who has been connected with these properties for a great many years, expresses the opinion that they are worth in excess of $40,000,000, and gives good reasons for his opinion. (Statement of Facts, pp. 247-249; Tr. pp. 64-67). The reasons for this opinion are set out at length on pages 9 to 14 of appellees' brief. A good many elements of property considered by Mr. Freeman are clearly "going concern values", and in practically every important particular he is corroborated by appellants themselves.

For instance: Mr. Freeman estimates the values of the trackage right, etc., arrangement with the G. H. & H. as worth at least $1,000,000. Appellants stated that it "is material to the interests" of the I. & G. N. "that the terms and provisions of these con-
647 tracts be kept and maintained" and that "it would be disastrous to the property to have these contracts annulled." (Statement of Facts, pp. 251-252). Mr. Freeman estimated the value of the "seasoning" of the I. & G. N. at the minimum sum of $1,000,000. That such a value exists is admitted by Mr. Fay, general manager for appellants, and a witness for them in this case. (Statement of Facts, pp. 161-162). Mr. Freeman estimates that the Magnolia Park Railway (a part of the Houston terminals of the I. & G. N.) is worth at least $1,000,000 more than the amount pair for it and accounted for in the $37,243,133.44 mentioned above. That these and other terminals have a value as a part of a going concern, and a value which cannot be localized, was admitted by Mr. Fay in this case. (Statement of Facts, p. 160), and by Mr. Booth,

traffic manager, admitted the same thing in effect. (Statement of Facts, p. 147.) Mr. Booth also testified that the I. & G. N. "has valuable franchises" in the city of Houston "worth a great deal from a traffic standpoint" which "added something to the value of the properties as a whole." (Statement of Facts, p. 150.)

Mr. Fay testified that "as to express, the railroad incurs no expense outside of the equipment; the handling is done by the express companies." (Statement of Facts, p. 161). The same, manifestly, is true as to the "mail"; the appellants received $245,373.74 from mail service and $181,999.98 from express service for the year ending June 30, 1915, and similar amounts for each year. (Statement of Facts, pp. 149, 252).

That the stock of the I. & G. N. Ry. Co. has a value of $5,078,000 in excess of par according to the judgment of its owners is conclusively established in this case. This additional value is represented by an interim certificate for that amount issued by the I. & G. N. Ry. Co. to the International & Great Northern Corporation, which corporation is also the principal stockholder of the I. & G. N.

The reason for the issuance of this certificate is briefly this: When
the properties of the old I. & G. N. Ry. Co. were sold out in
648 1911, the purchasers thought that they were worth in excess of $36,000,000, and provided for the chartering of the present I. & G. N. Ry. Co., with an authorized capital stock of $11,500,000. (Statement of Facts, p. 259.) When it was found that the Railroad Commission would not authorize the issuance of all the stock and bonds contemplated, stock was actually issued to the amount of $4,822,000, and the interim certificate was issued for the par value of $5,078,000 to cover excess of value over the Commission's valuation, and to be taken up in regular stock when the same might be lawfully issued. This item of $5,078,000 is carried as a liability upon the books of the railway company. (Statement of Facts, p. 133.) It is found in the "comparative general balance sheet" on page 242 of the statement of facts as "other deferred credit items." As to it, W. J. Werner, auditor for the company, testified as follows:

"The witness stated that the interim certificates appeared in the statement in the deferred credit items; that is, in the statement of the figures introduced. This means a liability. The face amount of the interim certificates was $5,078,000. The item appears somewhat larger as containing other elements. Interim certificates are carried as stock is carried, and, if added to preferred and common stock, would make the sum of $9,900,000. The authorized capital stock under the charter is $11,000,000, and under the plans of the company common stock is reserved to be exchanged for the interim certificates, as the Railroad Commission may increase its valuation to that extent. The $1,600,000 of bonds referred to above is exchangeable for preferred stock, and it added to the interim certificates and other stock, would make the amount of $11,000,000, but the company has not been capitalized up to that amount, according to the witness' books." (Statement of Facts, p. 133.)

With respect to the reasons for the issuance of the certificate and the value behind it, the International & Great Northern Corporation stated:

"The outstanding capital stock would be $5,000,000 of preferred stock, and $6,500,000 of common stock, making a total of
649 $35,139,000 of capitalization upon a property which then had actual indebtedness prior to the sale in excess of $36,000,000, and had demonstrated by its earnings, in operation by the receiver, a value in excess of that amount." (Statement of Facts, p. 259).

"On the question, as to the consideration moving to the company, we submit that the record in this case fully discloses an adequate consideration within the meaning of the law as defined and construed by the Texas courts." (Statement of Facts, p. 267).

"Without going further into an analysis of these features of the reorganization plan, which are set forth at length in the statement of facts herein, it is respectfully submitted that in consideration given by the reorganization committee to the new company, for its securities, including the proposed issue of $6,500,000 of common stock, a part of which is now represented by the conditional interim certificates, was not only a valuable and adequate consideration for all the securities, including the conditional interim certificates, but exceeded in actual present value the par value of such securities."

In other words, if the company could have issued all of its common stock at the time, it would have been supported by an abundant and valuable consideration as between the stockholders and the company, to meet the provisions of the Texas law, as construed by the highest courts of that State.

"That even if we consider the question of consideration as being now before us, yet the consideration given to the company by the reorganization committee under the plan of reorganization was adequate and abundant as between the company and its stockholders to sustain the issue of the entire $6,500,000 of stock provided by the articles of incorporation in accordance with the laws of Texas, as construed by its highest courts.

"That the company having received from the reorganization committee this consideration, having a present actual value in property and cash adequate to sustain the issue of all the common
650 stock authorized by its articles of incorporation, including that represented by the conditional interim certificates." (Statement of Facts, pp. 267-269).

Second Assignment of Error.

The Court of Civil Appeals erred in making the following finding of fact, to-wit:

"Our conclusion of fact from a consideration of all the evidence is that the International & Great Northern Railway Company had no intangible property taxable under the laws of this State when the

taxes sought to be enjoined were assessed thereon and the fixing of such values by the State Tax Board was the arbitrary finding of values that did not exist."

Statement.

The statement made under the first assignment of error is here referred to and adopted as a statement under the second assignment.

Authorities.

Third Assignment of Error.

The evidence in this cause shows that appellants had property subject to valuation by the State Tax Board of amount at least equal to the valuation thereof made by said board for the year in question.

Statement.

The statement under the first assignment of error is here referred to and adopted.

Fourth Assignment of Error.

The evidence having shown that appellants (and said railway company) had at least some property, and substantial property, subject to valuation by the State Tax Board for the year in question, the Court of Civil Appeals was without power, in this case, to set aside valuation in whole even though the evidence may have shown such valuation to be excessive.

651 Statement.

Same as under first assignment.

Fifth Assignment of Error.

The Court of Civil Appeals erred in the following conclusion in its opinion (on page 15 thereof), to-wit:

"It is shown from the whole evidence that the alleged intangible values of the railway company were found by increasing the par value of its capital stock by the application of the formula and reducing the value of its physical properties below the amount fixed by the State Railroad Commission and shown by the undisputed evidence to be their fair value and from the sum of the mortgage indebtedness and the value of the stock so fixed by the board deducting the decreased value of the physical properties."

Statement.

The statement under the first assignment is here referred to and adopted as a part of the statement under this, the fifth assignment of error.

In addition to such statement the record shows that the "formulæ" were used, if used at all by the board, as to the "preliminary valuation"; that upon the "final hearing" and preliminary to the final valuation, all evidence was heard and considered by the board upon the question of the correctness of the valuation of "tangibles" and the valuation of the "entire properties" irrespective of the "formulæ"; and that the mathematical or theoretical errors, if any, in the "formulæ" did not affect the final results and valuations.

In the first place, the formulæ introduced in evidence were simply private memoranda made by Mr. Bagby in an effort to give the interested railway a mathematical explanation of how the results shown in the preliminary estimates might be reached. (Statement of Facts, p. 348). These formulæ were thus given as to the preliminary estimates, and before the hearing before the board. (Statement of Facts, p. 348). At the hearing on the final valuation (which is the one involved in this case) all representatives of the railroads appeared and the board heard all evidence and argument submitted by
652 them, and any and all reasons they had to offer why the results of the preliminary valuation should not be made final. That the board heard and considered all evidence offered, and all facts shown by the reports before it, and all argument advanced, is not denied; that it thereupon considered the question as to the correctness of its valuation of the tangible properties and its valuation of the entire properties independent of the formulæ, is affirmatively and without conflict shown in the evidence. Mr. Bagby testified that the board "took into consideration the evidence that was offered at its final hearing." (Statement of Facts, p. 349). He positively stated that the board was not guided alone by the formulæ. Counsel for appellants asked the following question:

"Q. You were guided by this formula and the things expressed in the formula, and the fact that the railway was a going concern?" to which he answered:

"A. This and other matters."

(Statement of Facts, pp. 349-350). At another place counsel for appellants asked Bagby to "state what documents he had, or what were considered, and what data was considered, outside of the formula and outside of the fact that the I. & G. N. was a going concern," and he said that the board "had the I. & G. N. reports, and different letters, the Railroad Commission reports, and different tax reports, and different data that the former tax commissioner had left in his office. That he had a general knowledge of the railway company as a whole; that they (the board) took into consideration the fact that the railway was in the hands of receivers, and reduced the intangible assessment from 1914 (by) $3,500,000; that he had ac-

quired this information from any source that he could * * * that the board had investigated, generally, not only the I. & G. N. but the other railroads, and there was no discrimination on the part of the board as to the I. & G. N. Railway * * * that he as a member of the board tried to find out every item as to the railway company." (Statement of Facts, p. 352). He said "that his best judgment was that the I. & G. N. was worth $39,000,000 plus." (Statement of Facts, p. 354). He also testified as follows:

653 "That each of the railroads filed their reports in forms similar to those of the I. & G. N. and the T. & P. had done so for five or six years back; that the board considered these reports and the information in them, at least that he, the witness did, and that he considered the I. & G. N. reports and former valuations made by the board of all railroads, and got information from any source where he could find it, and considered all the evidence and argument offered by counsel for the railroads, and their witnesses, and that the final valuation in each instance reflects the witness' honest judgment as to what the evidence showed the values to be, and that he had no ground to suppose that it did not reflect the honest judgment of the other members of the board; that after hearing the evidence and those statements, the board decided, in their best judgment, that some of them should be reduced, and that the witness concurred in such decisions, because of the effect of the evidence on his mind; that he understood the law required him to consider the evidence; that he did so to the best of his knowledge and ability; that the board applied the formula, and if it resulted in what they thought, in their best judgment was correct, they let it stand; that if the board decided, after the evidence was in, that the formula did not reflect what one would call the best judgment of the board, then the board changed it." (Statement of Facts, pp. 364-365.) "That the different railroads make reports to the State Tax Board, and that the board gathered all the information it could from all sources, and at times examined the reports filed with the State Railroad Commission and other public records bearing on the subject, and read all the textbooks on the subject which they could get." (Statement of Facts, p. 342.) "That he had acted in good faith, and tried to get all the information he could as to what the intangible assets of the railways were, and had tried to study the statute. That in any mathematical calculation or formula, the two main factors which he had endeavored to find in order to arrive at the value of intangibles, were the real value and the physical value of the

654 railroads, that is, the real value of the entire property as a whole, and that he had done this in the case of the I. & G. N. Railway in connection with its valuation for 1915, and that the valuation found by the board of $39,000,000 plus represented his best judgment as to the true value of the entire properties upon all the information which he had before him, and that the facts showed that that was the proper valuation in the judgment of the court (board), and that he was under no coercion from any source in making that valuation, * * * that the valuation reflects the best judgment of which the witness was capable under all the informa-

tion he had, and that he saw no conduct upon the part of any other members of the board indicating that they were not exercising their best judgment, * * * that their representations consisted partly of facts and partly of arguments, with perhaps three witnesses, the auditor, the tax man and the head of the traffic department testified, but what they said did not change the opinion of the board, and that as far as he was concerned, he went into the hearing with an open mind, and gave a patient hearing." (Statement of Facts, pp. 343,-344.) "That these were supposed to be private memoranda and not public property, and that he did not remember, under the circumstances, and that all of these formulas were private papers, * * * all of these formulas introduced into evidence were just private memoranda." (Statement of Facts, pp. 348,349.)

If it were conceded that there were mathematical or theoretical errors in the formulæ, the evidence set out above would clearly indicate that such errors were not harmful to appellants. As shown, these formulæ were given out before the final hearing; the appellants and others were given notice to appear and show why the results, to wit: the valuation of the tangibles, the valuation of the entire properties, as made in the preliminary estimates were not correct; when the final hearing came on these results (no matter how arrived at) were the things considered, and as to these results the board heard and considered all evidence and information in its possession, and thereupon allowed the results to stand in cases
655 where it thought they were correct (after a consideration of all evidence and argument) and in cases where it thought the results to be incorrect (after considering the evidence), it changed the preliminary estimates.

That the supposed use of the formulæ in the cases of different roads worked no injustice to the I. & G. N. is made clear by the record. In practically every case the other roads were valued finally much higher per mile than the I. & G. N. The I. & G. N., with a mileage of 1,106 miles (Statement of Facts, p. 270), was valued by the board at $19,743,223, or at $9,713 per mile. Below is shown the mileage, the (intangible) valuation as made by the board, and the valuation per mile for the roads which, according to appellants, present the worst case of discrimination against the I. & G. N. (the mileage used is that shown on page- 291-292, and the valuations are those shown on page 270 of the statement of facts.):

Road.	Mileage.	Valuation.	Valuation per mile.
T. & P.	1,038	$19,717,189	$19,000
G. H. & S. A.	1,331	25,629,200	19,255
Ft. W. & D. C.	454	9,764,010	21,066
G., C. & S. F.	1,145	22,565,622	19,708
H. & T. C.	828	12,989,008	15,687
M., K. & T.	1,119	20,144,490	18,000

In nearly every instance the other roads were valued by the board at almost twice as much per mile as the I. & G. N.

Again, the board reduced the valuation of the I. & G. N. under the previous year by the sum of $4,745,377, whereas, it reduced some of the other roads' valuations by a very small sum, and in most instances increased the valuations.

The valuations of the roads named above for the two years were as follows:

Road.	Valuation, 1914.	Valuation, 1915.
I. & G. N.	$14,488,600	$10,743,223
T. & P.	20,117,955	19,717,189
G., H. & S. A.	25,297,360	25,629,200
Ft. W. & D. C.	9,991,080	9,764,010
G., C. & S. F.	19,469,592	22,565,622
H. & T. C.	12,400,650	12,989,008
M. K. & T.	19,629,750	20,144,490

(See Statement of Facts, p. 270.)

656 There is absolutely no evidence in the record by which the court can determine whether or not the valuations for any of the other roads were incorrect, too high, or too low, or by which it can determine whether or not, as a matter of fact, the valuations of the I. & G. N. were not in its favor as compared with any or all of the other roads valued. But since the valuations of all are at least prima facie correct, it would appear that the I. & G. N. has no complaint as between it and the other roads.

Sixth Assignment of Error.

The trial court, upon sufficient evidence, having found the following, to wit:

"I find that the State Tax Board in making the valuation of railroad intangible properties for the year 1915, considered all evidence and information before it, and that in making the valuations complained of in this case, acted in good faith and no sufficient evidence has been offered to show that their valuations were brought about, or affected, by fraud, bad faith, or other improper influences, and the evidence shows that such valuations reflect their best and honest judgment as to what the valuations should be", and

"The evidence is insufficient to impeach the valuations made by the State Tax Board and complained of in this case, and the relief prayed by reason of the allegations in subdivisions I and II of the petition should be denied," the Court of Civil Appeals erred in overruling and reversing such findings and the judgment based thereon.

Statement.

The statements made under the first and fifth assignments of error are here referred to and adopted.

Authorities.

(1) As to effect of trial court's findings:

(2) Insufficiency of evidence in general to impeach valuations:

657

Seventh Assignment of Error.

The Court of Civil Appeals erred in finding that "there is no evidence upon which the value of the stock fixed by the board can be sustained" and that such value was fixed by the use of the "formula" in question, whereas there was ample evidence to support such finding of value by the board, and such finding of value was not arrived at by the use of the "formula", but was arrived at from a consideration of all the evidence before the board, the supposed use of the "formula" being merely incidental and producing no error in the result.

Statement.

Same as under first and fifth assignments.

Eighth Assignment of Error.

The Court of Civil Appeals erred in those portions of its opinion and conclusions wherein it is said:

"At the hearing before mentioned plaintiffs in writing requested the board to give the data or information on which it based its findings of the value of the intangible property of the railroad. In response to this request it furnished the following formula, which it had used in assertaining said value.

" 'International & Great Northern Ry. Co.

Gross receipts,	1911	$9,782,165	
	1912	11,254,327	
	1913	10,902,041	
	1914	9,645,785	
Total			$41,584,318
$41,584,318÷4=			10,396,079
Capital stock issued and outstanding..		$4,822,000	
		26,181,500	
Total capitalization			$31,003,500

$10,396,079÷31,003,500= 33.53 Ratio.
12.50 Ratio T. & P.
33.53÷12.50= 268.24

$4,822,000×268.24	$12,934,533	
Mortg. debt at par	26,181,500	
True value		$39,116,033
Physical value (assessed value)		28,372,810
Intangible value		$10,743,233'."

658 There is no evidence upon which the value of the stock fixed by the board can be sustained, and when called upon and urged by the appellants upon the hearing before it to disclose what, if any, evidence or information it had which tended to disprove the showing made by appellants that no such values existed, the board only offered its "Rule of Three" formula,—because the evidence without conflict shows that the board at the final hearing considered all evidence and argument before it, and that from such evidence and information, regardless of the formula, it exercised its best judgment and thereby concluded that the tangible properties were worth $28,372,810, and that the entire properties were worth $39,116,033; and because the evidence further shows that the board when "called upon for an explanation" showed that it had considered all evidence and information before it.

Statement.

Same as under the first and fifth assignments.

Ninth Assignment of Error.

The Court of Civil Appeals erred in holding that values subject to valuation by the State Tax Board can only be shown to exist by one of two methods, namely: (1) By adding the values of the capital stock and the mortgage indebtedness to find the "entire value" of the property and by deducting therefrom the value of the physical property; or, (2) by capitalizing the net earnings of the carrier at a reasonable rate of interest, whereas the statute permits the board to adopt any method which all the information before it may show to be just.

Argument Under Foregoing Assignments of Error.

I. Judgment and Opinion.

On the 5th day of July, 1915, before the valuation made by the State Tax Board had been certified to the various counties, the defendants in error filed a bill in equity in the district court of the United States, at Houston, against the tax board and the members thereof, making the same attacks upon the valuation, and upon the same grounds, as are made in this case, and seeking to have
659 the tax board restrained from certifying said valuation and seeking to have the same set aside, or reduced. (Tr. p. 22 et

seq.) The proceedings in that case (in the Federal court) are incorporated in the statement of facts in this case, and they show that the issues as to the validity of the valuation were the same in the two cases. Upon presentation of the bill a temporary restraining order was entered by Judge Burns and the application for temporary injunction was set for hearing for July 15, 1915. (Tr. p. 29) The hearing was held, beginning on July 15th and continuing until July 20th, when appropriate orders were entered by Judge Burns denying the prayer for temporary injunction. (Tr. pp. 29-30.) While this was a hearing upon an application for temporary injunction, defendants in error introduced practically all the evidence with respect to the board's valuation that was introduced in this case, and this appears from the record herein. At the conclusion of the evidence, Judge Burns ruled against defendants in error upon the ground that the board's valuation stood unimpeached, and since we have here a direct decision upon the same issues and the same evidence, we deem it appropriate to set forth Judge Burns' opinion in full, as follows:

"Mr. Dabney of counsel for complainants: I would like to discuss the law in the matter.

"Court: The court is against you. It occurs to me that the action of the tax board under the testimony stands unimpeached, and you are not entitled to the relief you ask. I think that the formula that the board used is subject to a very positive criticism, but other formulæ may have been used that would have resulted perhaps even less favorably to the railway company than the present award.

"As to the system used, it does not occur to me that court or counsel are concerned. The author thereof would have difficulty in defending his formula. This record shows no suggestion of fraud on the part of the board, or any member thereof. It shows further that a very substantial reduction has been made against the valuation heretofore obtaining for a period of more than nine
660 years, towit: a reduction of three and three-fourths million dollars in the valuation of the intangibles. Whether this system ought to obtain in Texas, does not concern the court. It seems to me that the law has been fairly observed and the only disturbing feature to counsel for complainants is the suggestion that the stock of the I. & G. N. has a premium value of about eight millions of dollars. Of course, it has no such value. In fact, I do not suppose it has any value, other than the right and privilege it gives to the owners of a majority of the stock to operate and control the property. It is practically a franchise tax in the way of a penalty for the privilege of operating the property in the State of Texas. It does not occur to me that under the evidence—and the evidence having been offered at the hearing after due notice, at Austin, by the tax board—that there has been a denial of any right, privilege or guarantee under the Fourteenth Amendment to the Constitution, that is, the taking of property without due process of law. It does not occur to me that the evidence affirmatively shows, or even suggests, that there has been any discrimination against the property of the I. & G. N., as compared with a railroad of like mileage, and similarly

situated in the State of Texas. It is unfortunate that the State government leaves the matter so largely to the discretion of the members of that board. It seems to me that there ought to be some firm, positive rule governing the conduct of the members of the board in estimating the value of intangible property.

"The testimony is absolutely silent as to fraud; at most the only thing that can be said about the board is that the valuations placed upon the intangibles may be excessive, and I am inclined to think it is excessive, but that, and that alone, under the Federal authorities, would not warrant the court in restraining the action of this board. The valuation may be excessive, but, of course, if it is not excessive you have no ground of complaint whatever. Grant the valuation to be excessive, it must be discriminatory as against your
661 client before relief can be granted in this jurisdiction.

"It would be very delightful to the owners of this property to be shown that this railway stock had any premium attached to it—49 per cent of which would not justify a man in walking around the block to pick it up; the other 51 per cent enables the holders to operate this property for the benefits of the creditors. The road is bankrupt, and I do not see any prospect of its financial improvement. According to the testimony of Mr. Fay, it is one of the oldest roads in the State and has not yet become a standard railroad.

"It occurs to me that the application for injunction should be denied and the bill dismissed; but I will give the matter such direction as to the latter suggestion as counsel for complainants may suggest.

"Mr. Dabney: I would like to be heard on the matter.

"Court: I will hear you tomorrow morning at 10 o'clock.

"Court here adjourned until tomorrow morning at 10 o'clock, this July 19, 1915.

"Court met pursuant to adjournment to 10 o'clock A. M. this July 20, 1915.

"Mr. Dabney: I have an amendment I would like to offer.

"Court: Your amendment comes too late. Leave to file same is denied.

"Complainant excepts.

"Court: Mr. Clerk, you will enter an order in this case revoking the order permitting the receivers to file their ancillary bill on the ground that the same, in the opinion of the court, was improvidently granted.

"You will enter a further order denying the receivers' application to amend their bill.

"Court: Under the evidence, and under the authority of Pittsburgh, C., C. & St. L. R. R. vs. Backus, 154 U. S. 421, it clearly appears that there has been no denial of any privilege or right guaranteed to the complainants by the Fourteenth Amendment to
662 the Constitution of the United States and the prayer of the complainants for a- injunction is denied."

Some weeks after the order had been entered by Judge Burns denying the application for a temporary injunction, the defendants in error, without notice of any kind to the tax board, or anybody representing it, procured an order in the Federal court dismissing the suit "without prejudice", and later filed the present suit in the State court.

Pretermitting discussion as to the power of the court to overturn the valuation made by the board because of lack of necessary parties, and deferring, also, discussion as to the "formulæ" and its use, we first assert the proposition that there is ample evidence to support the finding of $28,373,810 as to the value of the physical properties, and to support the finding of $39,116,033 as the value of the "entire" properties of appellants. Sequentially, we say, there can be no error in the final result obtained by subtracting the smaller figure from the larger and denominating the result as the value of the "intangible properties". If the major premise is correct, the accuracy of the deduction cannot be challenged. For the statute plainly requires the board to find the value of the physicals and the value of the entire property and to deduct the one from the other, "and", says the statute, "the residue and remainder of value (thus obtained) shall be by said tax board fixed, determined and declared as the true value of the intangible properties."

First, as to the Valuation of the "Tangibles."

A railway company owns an operated railway. It is a going concern. As such,—unless in very exceptional cases,—it has a value which cannot be localized as to any particular parcel of the whole. Between the intrinsic worth of the right-of-way, road, bed, steel, ties, locomotives, cars, etc., as separate units and the entire value of the enterprise as a whole there is a twilight zone, a value which cannot accurately be segregated and ascribed to any particular piece or element of the whole. As said in Fargo vs. Hart, 193 U. S., 499:

663 "When * * * property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the State * * * The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole."

See, also, Ry. Co. vs. Bachus, 154 U. S., 421.

Every tie, every yard of rail, every station building in Anderson county has a value over and above the commercial value of the individual tie, etc., because of their organic relation to the ties, steel, buildings, etc., in Harris county and in every other county, and because the whole,—in its "arganic unity" constitutes the means of carrying on a great business yielding a revenue of $11,000,000 per year.

That the additional value exists is manifest; that the properties may apparently be bankrupt and in the hands of receivers does not at all subvert its existence.

In the Railroad Tax Cases, 92 U. S. 575, it was shown that one of the companies involved "is insolvent, and in the hands of a receiver. It is unable to pay any interest on its bonds. Its capital stock is of no value. But the bond of equalization assessed the capital stock and franchise at $2,003,415, and its tangible property at $2,629,367, thus assessing a property which pays but little, if anything, beyond its running expenses, at the sum of $4,632,782." (Page 606). This was offered as a reason for the invalidity of the assessment. But, in disposing of the matter, the court said: "This sounds plausible; but is nothing more. Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable,—there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals and corporations, ought to pay its proportion of the public burdens.
664 There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value,—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling stock, and other tangible property? Is it supposed by anyone that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town lots and household furniture and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose." (Pages 606-607.)

Destroy the terminals in the cities and deny the carriers access to them, and you destroy a value far in excess of the value of the land upon which the terminals are situated and the value of the steel and ties in the terminal tracks. Because over these terminals are handled the traffic originating at or destined to stations in Anderson county,—for instance,—and because the ties and rails and station building are located in Anderson county whereby this traffic can be secured, the ties and rail and station buildings in Anderson county add something to the value of the terminals in distant cities, and the terminals in the distant cities add something to the

value of the ties, rails and station buildings in Anderson
665 county. Because of time and use the roadbed as a whole has acquired a value in excess of the cost of acquisition or the cost of reproduction new; that this element of value exists is testified to by appellants' general manager (Statement of Facts, pp. 161-162); the amount of this value is estimated by Mr. Freeman at the minimum sum of $1,000,000. And yet, if the organic unity of the road were destroyed, or impaired, by the destruction of the terminals this element of value throughout the line would be measurably impaired, for how could the "seasoning" of the roadbed be worth anything if the use of the road itself were destroyed? If the terminals were destroyed, the use of the rest of the road would be diminished; if the mileage in Anderson county,—for instance,—were segregared from the whole and destroyed or sold this would necessarily impair the value of seasoning of the line in Tarrant county because the transportation of traffic between Fort Worth and Palestine constitutes a portion of the use of the road in Tarrant county. Necessarily, also, the existence of the ties and rails, and a place for them, in Anderson county, adds something to the value to the company of its express and mail contracts because express matter and mail are received and delivered in that county; and for a like reason the existence of the express and mail service adds something to the value of the physical equipment in Anderson county. And so, as to value, every piece of equipment and every activity is bound together, and each has a value,—independent of its intrinsic worth,—because of all the others. And because the additional values grow out of and exist because of the "organic unity", they cannot be localized as between the various counties through which the road operates. For who can trace the line of demarkation between the intrinsic worth of each unit of physical equipment and the additional use given it by the organic relation, or measure out in dollars and cents the separate values?

And yet because our laws require the intrinsic worth of the units
666 of physical equipment in each particular county to be value there, and require the total value to be ascertained by State agency, somebody must make the attempt at segregation. And who is best qualified to make the attempt? Manifest reason suggests that the managers of the property, because of their relation to it, and familiarity with it, are best qualified to make the classification in so far as it may be made at all. Certainly the appellants are in a better position than anybody else to say what their roadbed, buildings, etc., in Anderson county are worth when separately and intrinsically considered. This would seem to be obvious.

And this classification as to the property in each and all of the counties they have made from year to year. Under solemn oath they fixed the value in all of the counties for the year 1915 at approximately $14,000,000, exclusive of "rolling stock". And the "rolling stock", under oath, they valued at $2,168,906 for the same year. Making a total valuation by them of $16,168,906. Surely this valuation is of some probative force. It is sworn to. It is a declaration against interest. It is a declaration made to become

a public record for the guidance of public officials in the performance of their duties. If it be said that appellants caused perjury to be committed in order to escape taxation in the various counties, this, of itself and in all fairness, ought now to estop them from challenging the accuracy of the classification. By every rule known to jurisprudence this declaration ought to be accorded the maximum of probative force. To accord it other than maximum probative force is to invite continued perjury and place a premium on chicanery.

Of this declaration and classification the State Tax Board knew, and must have known, and of it they surely had the right to take notice, in ascertaining the value of the tangible properties. At all events it must prove any justifiable ground for saying that the board acted fraudulently, arbitrarily or unlawfully in finding a value of $28,372,810 for the same elements of property to which the appellants themselves, under oath, affixed a value of only $16,168,906.

667 Under the statute and under the Constitution, the State Tax Board might, lawfully, have taken this $16,168,906 as its valuation of "tangibles." This *is* could have done for two reasons:

In the first place, appellants would have been estopped to question a valuation made according to their own representations.

A taxpayer "is absolutely bound by his rendition and all facts stated therein."—Pfeiffer vs. San Antonio, 195 S. W. 933,—and cases there cited.

Inland Lumber Co. vs. Thompson, 11 Idaho, 508, 83 Pac., 933; Slimmer vs. Chickasaw County, 118 N. W. 779; Clyburn vs. McLaughlin, 106 Mo. 521, 17 S. W. 692.

In the second place, this authority is plainly recognized by the Supreme Court in M., K. & T. Ry. Co. vs. Shannon, 100 Texas, 379. This proposition involves an expression made by the Court of Civil Appeals in its opinion in this case. The expression reads as follows:

"Any statute which conferred upon the State Tax Board the power to value and assess tangibles as intangibles and apportion such values among the various counties as provided in this statute would clearly be obnoxious to the provisions of the Constitution which requires tangible property to be assessed in the county in which it is situated."

The State Tax Board does not "assess" anything. It values. There is a difference between an assessment and a valuation. While Sections 8, 11 and 14 of Article 8 of the Constitution seem to require the assessment of property to be made in the counties, but Section 1 of the same article provides that "all property in this State, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value, which shall be ascertained as provided by law." In the Shannon case, the Supreme Court

668 discussed these provisions of the Constitution, in relation to the duties of the tax board, and said:

"If it be conceded that it was the intention of the makers of the Constitution to confer upon county assessors the exclusive power to

list and set down the value of all property in their respective counties, subject to an ad valorem tax, it cannot be denied that the Legislature is empowered to provide the mode of ascertaining their value." (Page 392.)

There would seem to be no more objection,—from a constitutional standpoint,—to permitting a State board to value "tangibles" than there is to permitting it to value intangibles. The constitutional provision referred to does not say that "all property of railroad companies, except intangibles, shall be assessed * * * in the several counties"; it says "all" such property shall be so assessed, except rolling stock. And upon this point we call attention to the following language of the Supreme Court in the Shannon case: "Our Constitution, after declaring that 'taxation shall be equal and uniform' and that property shall be taxed according to its value * * * adds in the same sentence 'which (value) shall be ascertained as may be prescribed by law.' This would seem to leave the Legislature free to adopt the mode of ascertaining the value of any class of property by such method as it might deem best." (Page 395.)

The Intangible Tax Act, at the time of the decision in the Shannon case, provided that the State Tax Board might take the value of the physicals as assessed in the various counties as the measure of the "true value of the tangibles" and the point was made and urged that this was an arbitrary and artificial rule violative of the Constitution. The court held that this was not an arbitrary rule; "on the contrary, we think they are reasonable and well calculated to effect the purpose of the act." (Page 394.) The act as it then existed provided for the finding of the value of the entire properties substantially as provided by the present act and required the board, except where the evidence showed some other method to be more just, to de-
669 duct from the "entire value" the assessed value for taxation of all the property and assets of said company * * * as the same is found to be assessed for State and county taxation in the locality wherein the same is legally taxable," (See Acts of 1905, p. 355) and the remainder was required to be fixed as the value of the intangibles. As stated before, these statutory rules were upheld and approved by the Supreme Court in the Shannon case. The board then as now was required to find the true value of the physicals (see Section 6, Act of 1905) but it was expressly authorized to take the assessed value as the true value of the physicals.

The Act of 1905 was superseded by the present act, and while the express authority to take the "assessed value" as the true value was dropped from the statute such implied authority remains because necessarily the discretion of the board was materially broadened by the new act. By Article 7420 the board is expressly empowered to follow "any method of calculation which it believes best calculated, under all circumstances, to bring a just" valuation of the properties. Under the Act of 1905 the "assessed value" as the basis of the finding of tangible values was required unless the evidence indicated a better method; the abolition of this requirement by the Act of 1907 did not mean that the board could not still take this basis, if it

thought proper under the evidence, but simply meant that this or any other method warranted by the evidence might be pursued.

Now the appellants reported to the State Tax Board the assessed value of their tangibles as being $30,313,436, including "rolling stock." (Statement of Facts, pp. 88-89.) But this included the "intangible valuation" for the preceding year, the sum of $14,000,000, approximately (Statement of Facts, p. 165), and the assessed value of the tangibles was, therefore, approximately $16,313,436 (including "rolling stock"). The value as rendered in the various counties, as shown above, was approximately $16,168,906, corresponding very closely with the "assessed value."

670 If results, rather than forms, are to be regarded as determinative of the validity of the board's action, we think the above figures should be regarded as the "value of the tangible property" for the purpose of testing the legality of the results. We shall, later, submit the proposition that every possible hypothesis which might support the action of the board must have been negatived before the court would be authorized to annul the results; this proposition is based upon the principle of law, which we understand to apply here, that it is immaterial that an administrative or quasi-judicial board, or an inferior court, may ascribe an improper reason for its action so long as the final result of the order, or judgment, is substantially correct. If this proposition is sound, and we think it is, it affords an undoubted hypothesis upon which the valuation of intangibles may be sustained. Appellants admit, and the Court of Civil Appeals finds, that the entire properties are worth at least $34,000,000 (the valuation made by the Railroad Commission, plus additions and betterments). If either the amount sworn to by appellants as the value of their tangibles, or the "assessed value" of the tangibles, is deducted from the minimum value of the "entire property," more than $15,000,000 is left as the sum which might be fixed as the value of the intangibles under the provisions of the statute and under the authority of the Shannon case; this sum exceeds the valuation of intangibles as fixed by the board by more than $4,000,000. That this hypothesis is reasonable and lawful and that its application could not operate an unconstitutional discrimination against appellants so conclusively appears as to preclude the granting of equitable relief.

This necessarily follows from the very constitutional provisions which appellants invoke. The sole purpose of our laws in regard to taxation is to compel each person to bear the burdens of government in proportion to the amount of property he owns, and when all alike

671 equally share in this burden, no one has a right to equitable relief, even though one piece of the property of the person seeking relief be valued above other property, if there be a sufficient decrease in the valuation of another piece of that person's property to make him pay the same amount of taxes according to what he owns that every other citizen pays,—M., K. & T. vs. Hassell, 123 S. W., 191; C., R. I. & G. Ry. Co. vs. Ratliff, 177 S. W., 571 Let us apply this principle to facts of this case about which there is no dispute Appellants own property in the State of value at least

of the sum of $34,000,000; this is assessed for taxes, including the intangible valuation made by the board, at about $26,000,000. (Statement of Facts, p. 165.) They have property in Harris county exceeding $3,205,202, assessed in the county at only $1,106,105, and including the amount certified to the county out of the "intangible valuation," their properties in Harris county are assessed at only $1,709,332. (Tr. pp. 84-85.) In addition to the $3,205,202 they have valuable "franchises" in the county (Statement of Facts, p. 150) which certainly must be regarded as "going concern" or "intangible" property. But if we consider only the $3,205,202, then they are taxed on only about 34 per cent thereof, while other people generally in the county are taxed on at least 50 per cent of the value of their property; if only the $3,205,202 is to be considered, then, in order for appellants to be taxed on their property in the general proportion, they owe taxes on at least $496,496. Certainly a court of equity, called upon to prevent discrimination in taxation, ought not to create discrimination; and this the court will inevitably do if the total assessment of appellants is reduced below $1,602,601 (50 per cent of the sum of $3,205,202). Under no conceivable view of the record should the $603,227 apportioned to Harris county by the State Tax Board be reduced below the sum of $496,496, if M., K. & T. vs. Hassell, and C. R. I. & G. vs. Ratliff, supra, are sound, and in both cases the Supreme Court refused writs of error.

But if we are in error in what has been said above, certainly the valuation of $16,168,906 placed upon their tangible properties by appellants themselves is competent evidence to support the proposition that the tax board did not act arbitrarily and without cause in finding $28,372,810 as the value of the "tangibles."

672

That the board was amply justified in valuing the "tangibles" no higher than $28,372,810 is clearly shown by evidence other than that which has just been mentioned.

For the purpose of enabling the board to perform its duties, the statute (Article 7415) required appellants to "make out and deliver into the possession of the tax Commissioner a statement containing the information required—(by Article 7416)—which statement shall be duly verified by affidavit." Amongst the information required to be given in the statement (by Article 7416) is the following: "(*f*) The assessed value and also the true value of all the tangible property owned * * * in each county in this State and the total assessed value and also the true value thereof." Article 7417 requires the board to "examine" the statement, and Article 7418 requires the Commissioner to place the statement before the board. Article 7419 requires the board thereupon carefully to "examine and consider the said statement" and "if they deem it advisable to do so" the board shall hear further evidence. The board is expressly required to consider the matters shown in the statements in the making of the valuations. These statements were made for the year in question, were received by the board and were considered by it. About this there is no question. The statement so made by the appellants, and so considered by the board, showed

the "true value of all the tangible property" (except "rolling stock") to be the sum of $26,026,810.78. (Statement of Facts, p. 88.) The value of the rolling stock was shown to be $2,168,906. A total valuation of all tangibles of $28,194,976.78. Now we are left to a presumption that this evidence was considered by the board in its finding of "tangible" values. Mr. Bagby testified that the board took these figures submitted by appellants as the basis of its
673 finding. (Statement of Facts, pp. 350-351.) These things are uncontradicted.

Viewing the purpose of requiring the reports to be made by appellants together with the undisputed fact that the board acted upon the information thus given, it must be clear that appellants are estopped to question the accuracy of the finding as to value of tangibles. Estoppel was pleaded. (Tr. p. 45.)

Appellants say that the board acted arbitrarily and unlawfully in considering the evidence thus furnished by them under oath. With sublime assumption they pass, without comment or attempted justification, the fact that their agents, under oath, for the same year, fixed a value on the same elements of property $12,000,000 less than the value found for it by the board, they ignore the plain fact that these agents again, under oath, stated directly to the board that the tangible properties were worth only $28,168,906; and then proceed to yell fraud because the board believed their agents might be able to tell the truth at the second trial and because the board accorded truthfulness to the sworn statements. Their attitude means that it is all right for them to cause the commission of perjury in order that the public may be defrauded of revenues to which it is entitled, but that it is little less than a crime for an officer to accord them the belief of truth telling. We believe the processes of the law may not thus be mocked, and that equity will turn a deaf ear to such an appeal for advantage from appellants' own wrong.

Mind you, we are here trying the validity of an order of a quasi-judicial board which imports verity. The attack must be sustained, if at all, because there is no reasonable hypothesis to support the order. The burden is upon the besieger to negative the existence of sufficient evidence. The order, prima facie at least, is regular and is based upon lawful grounds. Until all possible lawful grounds have been shown as non-existent the order remains conclusive.

The sworn rendition by the appellants, and the sworn report to the board, certainly constitute sufficient evidence to sustain this particular finding if the facts stated under oath by appellants for
674 the guidance of these officers are worthy of credence. But appellants say the affidavits of their agents are unworthy of belief and should have been ignored by the board for two reasons:

First, because one of their agents,—the man who told the county officials, under oath, that appellants' tangible properties were worth only $16,138,906,—after the making of the sworn report to the board by another agent said that this other agent was mistaken in his statement of tangible values. In other words, appellants say, because Mr. Holder, after the preliminary valuation, said that the

sworn report by Auditor Werner was erroneous in its statement of tangible values, Mr. Werner's report ought to have been disregarded as unworthy of credence. This attitude would appear to an ordinary man to be exceedingly puny, if not in fact pusillanimous. Let us analyze this remarkable position from the standpoint of the board:

In stating the value of "tangible" properties to the board the motive, clearly, is to state them as high as possible. Mr. Werner's report was formally and deliberately made, and he must have known at the time of making it that the higher he could consistently show the physical values the lower the intangible values would be. Of course, as auditor of these properties for a long time he knew, or at least presumptively knew, that these same tangible properties had been listed, under oath, at about $16,000,000 in the various counties. From all the information he had as to the properties and business of the company he arrived at the conclusion that $28,194,976.78 was as high a valuation as he could swear to; and thereupon this figure was set down and sworn to, and the report as sworn to was filed for the guidance of the board. Now, Mr. Werner appeared before the board and testified upon the final hearing, and the record shows that he did not tell the board that his figures were cor-
675 rect, nor did counsel for appellants ask him a single question about his valuation. His testimony before the board is set out on pages 47 to 55 of the statement of facts in this case, and nothing can be found in it to show that he ever intimated to the board that his figures were incorrect, or that even in his judgment they were too low.

At the hearing before the tax board appellants, without having asked Mr. Werner about the tangible valuations, placed Mr. Holder on the witness stand. He said that the data shown in Mr. Werner's report as to intangible values was the same as that shown in the reports "for the last several years", and that it was furnished by his office to Mr. Werner. (Statement of Facts, p. 61.) But the fact remains that Mr. Werner included the figures as his own over his own affidavit, and there is absolutely nothing to show that the figures did not represent Mr. Werner's own judgment as to the valuations. Thereupon, Mr. Holder gave it as his opinion that Mr. Werner's figures and report "does not show the true physical valuation." (Statement of Facts, p. 31). The board, therefore, had before it Mr. Werner's estimate of value, unimpeached so far as Mr. Werner was concerned, and corroborated by the undenied fact that the estimate was in line with the estimate made by the railway company from year to year "for the last several years". To say that it was bound to take Mr. Holder's opinion in preference to that of Mr. Werner, and in preference to the valuation formally made by the railway company "for the last several years", is to deny to the board all discretion in passing upon the weight of the evidence and the credibility of the witnesses, a function that is not denied to any other quasi-judicial, or judicial body in existence. To deny this right to the board is to say that it has absolutely no discretion as to the minimum value to be placed upon tangibles but that it must take the

latest and highest estimate of value placed upon the property by any of the carrier's witnesses.

That the board acted reasonably, at least not arbitrarily, in
676 preferring Mr. Werner's estimate over that of Mr. Holder is a conclusion that may properly be drawn from the evidence. Mr. Werner, as stated before, was corroborated by the figures submitted for "the last several years"; he has been in the employment of the railway company for many years in the responsible position as auditor and assistant auditor (Statement of Facts, p. 77), positions in which he must have become intimately acquainted with the affairs and properties of appellants, whereas Mr. Holder had been in his position only for "a short time" when Mr. Werner's report was made. (Statement of Facts, p. 61.) The board understood, and the record very clearly indicates, the motive of the appellants and of Mr. Holder to "boost" the tangible values at the final hearing, and this was assuredly a matter rightly considered in determining the weight of Mr. Holder's testimony. Besides the board knew that this same Mr. Holder had shortly before rendered, under oath, these same tangible properties as having a value of only $16,168,906.

The other circumstance assigned as indicating that the board acted arbitrarily and unlawfully in taking $28,372,810 as the value of the "tangibles" is the fact that the Railroad Commission had valued the properties of appellants at $32,471,027.05, exclusive of some additions and betterments, which valuation the court says was shown "by the undisputed evidence to be their fair value."

The record will be searched in vain for any evidence whatever to show that the Commission's valuation was the fair value, either of the properties as a whole or of the tangible properties, aside from the mere circumstance of its having been made by the Commission. The appellants expressly declined to admit that the Commission's valuation was correct. In the formal argument filed with the board by counsel for appellants they say: "We do not mean to admit that the tariffs (meaning the Commission's valuation) are correct." (Statement of Facts, p. 43); "we have not undertaken to discuss what are the physical valuations of the I. & G. N. Ry. Co., nor do we admit the correctness of any mentioned." (Statement of Facts, p. 44.) This formal argument was filed with the board for
677 its guidance in making the final valuation, and it seems reasonable to say that the board was not bound to take a valuation (for tangibles) which appellants themselves declined to agree to be correct.

Another reason why the board was not bound to take the Commission's valuation of all the properties as the value of the tangibles alone is to be found in the fact that this valuation included 6 per cent as a "franchise value". (Statement of Facts, pp. 42, 373.) This is undisputed, and, therefore, the board would have been bound to find approximately $2,000,000 intangible values if it were bound to take the Commission's valuation at all, for certainly no one will contend that a "franchise value" is a "tangible value". In addition to the above mentioned 6 per cent "franchise value" allowed in addition to the total valuation by the Commission, the

valuation of the Commission also included the value of specific "franchises". For instance, its valuation of the Magnolia Park Line aggregated $515,475.29, of which $100,000 was allowed for the "value of the franchises on streets of Houston." (Statement of Facts, p. 370). The total amount of franchise values included in the Railroad Commission's valuation is not shown in the record, but the above indicates that a considerable amount must have been included on this account. So it must be clear that it would have been improper for the tax board to have placed the value of the tangibles alone at the Commission's figures, even if it had been proper for this valuation to have been taken as a basis for the action of the board. There is absolutely nothing in the record to show that the Commission's valuation would have exceeded the physical values found by the board if the "franchise values" included in the Commission's valuation had been deducted. We repeat that the order of the board was prima facie valid; appellants were attacking it for lack of supporting evidence; the burden was upon them to show lack of evidence; they could easily have shown the amount of franchise values included in the Commission's valuation, and this they refused to do; we think it necessarily follows that a mere showing that the Commission's valuation, as a whole, exceeded the value allowed
678 by the board for tangibles alone is wholly worthless and incompetent to impeach the order of the board. We say that the undisputed facts just mentioned demonstrate the proposition that it would have been improper for the board to have accepted the Commission's valuation as a whole as the value of the tangibles alone, even if it had been incumbent upon the board to take the Commission's valuation as a basis for its findings.

But there is nothing in the law that indicates any duty to take the Commission's valuation as a basis. That any such duty exists is expressly negatived. The statute, which measures the powers and duties of the board, very clearly imposes upon it the duty of exercising its own discretion in finding values independent of any other agency. If the Legislature had intended for the board, to any extent, to be bound by the Commission's valuation it would have said so; it neither said so expressly or by implication. The entire statute negatives any such implication. It expressly mentions certain data to be acquired and considered by the board; among this specified data the reports or valuations of the Commission are not mentioned. According to the statute, the board could act alone upon the data specified, or it can call for or acquire any other information deemed needful; and upon the data specified, and such additional information as may have been acquired, the board is commanded to exercise its own independent judgment. To hold, therefore, that the board must accept the Commission valuations is to hold that it must simply execute the judgment of the Commission and leave its own discretion unused. Of course, the board, under the general terminology of the act, may consider the Commission's valuations for what it may think the information is worth, but the law will be read in vain in an effort to find anything that hints at its duty to be bound thereby.

Appellants made no effort to show the board what the true value of their tangible properties were worth; they were content to rely upon the Commission's valuation, plus some additions and betterments, to indicate the minimum value which should be placed upon the tangibles, and at the same time expressly told the board that they declined to admit the accuracy of the Commission's
679 valuation. This, together with the simple statement of Mr. Holder that Mr. Werner's sworn report as to the value of tangibles did "not show the true physical valuation," is all the assistance they rendered the board.

In view of the matters above set forth we submit the proposition that there is absolutely nothing in the record to impeach the finding of the value of "tangibles" as made by the board, but that, on the contrary, the findings made by the trial court are supported by the overwhelming preponderance of the evidence.

II. The Finding as to Value of the Entire Property.

We again defer discussion of the "formulæ," insisting that if there was sufficient evidence to support the board's basic findings of value the supposed arithmetical errors were immaterial.

There were but two things which the board were authorized to consider and determine upon the final hearing. One was the value of the physical properties; the other was the value of the entire properties; the difference between these two things, as found, was determined by the statute itself as "the true value of the intangible properties."

Upon this issue appellants made no serious attempt to assist the board. At no place in the proceedings before the board or before the courts have they made any attempt to show what the true value of their entire properties were. True it is they have offered certain theories and rules in an effort to show incorrect results; but these theories and rules themselves are arbitrary and artif-cial, as will be shown hereinafter. They have insisted that, according to these rules, there could not have been a value equal to that found by the board, but nowhere have they denied that their properties, as a matter of fact are not worth the amount found by the board.

Before the board, as before the courts, they offer the valuation of $32,471,027.05, plus $1,542,065.02, invested in additions and betterments. But, as stated before, they emphatically told the
680 board,—before the final valuation was made by it,—that they did not admit the correctness of the Commission's valuation. They also told the board that 6 per cent was included in the Commission's valuation as "franchise value." (Statement of Facts, p. 42.) The theory on which they offered the Commission's valuation to the board upon the question of "entire value" while declining to admit its accuracy, as stated by them, was an effort to convince the board of the supposed injustice of taking the Commission's valuation as a limitation upon stock and bond issuance and income while taking a higher valuation for taxation purposes. That there is no injustice or illegality in taking one valuation for security and

rate purposes and a higher valuation for purposes of taxation is uniformly held by the courts.

But if there were injustice in such a practice it simply flows from the public policy instituted by the State, the legality of which is in no way involved in this case. So long as the Railroad Commission and the State Tax Board remain as independent agencies, charged with the duty of exercising their best judgment as to matters confided to their respective jurisdictions, it is probable that there will be differences in the results reached by them. This is natural; it is the inevitable result of individuality. I say that a certain horse is worth $100; you say that he is worth $150; both of us express our honest judgment, and neither of us can say, in detail, just why we think the value is as we state it.

But the Commission's valuation is in evidence; it is to be considered for what it may be worth. We have stated certain reasons why we think it cannot be taken as a minimum valuation of tangibles. The same reasons would indicate that it may be given some weight upon the question of the value of the entire properties. Plus the amount shown for additions and betterments, the valuation is the minimum estimate of the value of the entire properties. It furnishes, therefore, a starting point and compels the conclusion of error in the judgment of the Court of Civil Appeals. For if this
681 $34,013,092.07 be taken as the value of the entire properties and $28,372,810 be taken as the value of the tangibles, the statute itself compels a finding of $5,640,282 intangible values; $5,640,282 is 52.5 per cent of $603,227 (the proportion of the $10,743,223 belonging to Harris county) is $316,694.17, the taxable value belonging to Harris county if it be proper to reduce the total intangible valuation to $5,640,282. If this valuation of $316,694.17 is allowed to Harris county, the evidence is conclusive that there would be no discrimination against appellants. The unchallenged finding of fact by the trial court is that other property, generally, in the county is assessed "at at least 50 per cent of its value." (Tr. p. 86.) There is ample evidence to warrant a finding of a much higher per cent. Now the portion of the $34,013,092 belonging to Harris county amounts to at least the sum of $2,731,822, and the assessed value thereof is only $1,106,105. (Tr. p. 84.) If the $316,694.17 were added to the "assessed value" and taxes paid thereon appellants would not be discriminated against. M. K. & T. vs. Hassell, 123 S. W. 190; C. R. I. & G. vs. Ratliff, 177 S. W. 571.

A finding of $316,694.17 for intangibles in Harris county,—separately considered,—would be amply supported in uncontradicted evidence. In the valuation of the $515,475 for the Magnolia Park Line as made by the Commission, $100,000 was allowed to cover the worth of the franchises pertaining to that one piece of line. The testimony shows this to be a very low valuation. (Statement of Facts, pp. 370-371,150; Statement of Facts, p. 370) Mr. Booth, traffic manager for appellants, testified that this and other franchises in Houston were very valuable (Statement of Facts, p. 150), but he placed no definite valuation thereon. In addition to this $100,000,

the $2,331,822 included 6 per cent as a general franchise value and this would amount to about $140,000.

But the undisputed evidence is that the "entire properties" are worth much more than $34,013,092.07.

Up to June 30, 1915, the sum of $46,502,041.55 had been
682 invested in the properties. (Statement of Facts, p. 130.)

This, of course, included expenses incurred in creating and maintaining the organization, securing franchises of various kinds, and in bringing the entire property to its present condition of an organized, going concern. Manifestly many of the things for which this expense was incurred could not be localized but belonged to the property in its "organic unity." An illustration of this is the sum of about $100,000 incurred in securing franchises in Houston, which franchises would be worthless,—or at least worth very much less than their present value,—if they were considered separately and as segregated from the entire railway or any part thereof. Of course, the physical equipment for which part of this money was spent has been subject to depreciation; but it is equally true that in other material respects the property has been subject to appreciation. An illustration of depreciation would be the wear and tear and deterioration of locomotives; an illustration of appreciation would be the seasoning of the roadbed by use and time, which element of value is admitted by Mr. Fay. He said: "A good track is the foundation of a railroad and the first requisite." (Statement of Facts, p. 152); "seasoning means, as to roadbeds, settling; the main line of the I. & G. N. between Mart and Longview is pretty well seasoned, but there are a good many raw spots between Houston and Fort Worth; as to the value of seasoning, and the length of time it takes, the witness stated he had no definite opinion, the problem depends too much on location and different situations." (Statement of Facts, pp. 161-162) Mr. T. J. Freemen said competent engineers estimate this value at from $1,000 to $5,000 per mile, and he estimated this value for the I. & G. N. at least $1,000,000. Whatever portion of the expense incurred to the company by reason of the acquisition of this element of value cannot be located; part of it, manifestly, came out of the total investment mentioned; other parts of it came out of operating expenses; obviously it is a value,—an appreciating value,—which has grown up and attached itself to the

property because of the operation and use of the property as
683 a going concern, as an organic unit. Another element of "appreciation" is derived by the growing volume of express and mail traffic, and the general growth of the business in all other phases. It would seem reasonable to say that the physical units of an enterprise devoted to a certain business would increase in value along with the general increase in the business of the enterprise. This, if true, would indicate that the property as a whole,—as a going concern,—is worth something more,—materially more,—than the actual investment less depreciation on the physical units.

Now the appellants' own books show that the property is valued by them at the sum of $37,243,133.44 (Statement of Facts, p. 243.) But this takes account of depreciation on the physical units, but does

not take account of any of the elements of "appreciation" such as "seasoning" and value acquired from a growing business of a going concern. Neither does it take account of the value of the express, mail, trackage and other contracts which necessarily contribute something very material to the value of the entire properties. It would seem, therefore, to be all together just and reasonable to take the $37,243,133.44 as the minimum value of the entire properties. And if this is done, and the value of tangibles as found by the board ($28,372,810) is subtracted therefrom, the sum of $8,870,323 is left, which the statute says may be taken as the value of the intangibles. This sum is 82 per cent of the amount found as intangible value by the board, and if the intangible valuation apportioned to Harris county were decreased proportionately it would be $494,636.

But there is uncontradicted evidence to show a value of the entire properties much in excess of the $37,243,133.44 and at least equal to that found by the tax board.

For instance, there is the $1,000,000 value of "seasoning." As has been stated with some iteration, the existence of a value of this kind is admitted by the witnesses for appellants, and Judge Freeman's minimum estimate of $1,000,000 has nowhere been denied or impeached. And if this element alone is added to the $37,-
684 243,133.44,—shown above,—and the tangible values found by the board is subtracted from the total, an intangible valuation of $9,870,323 is accounted for and against the $10,743,-223 found by the board.

Again, appellants are possessed of a long-term arrangement whereby they secure the use of some fifty-five miles of railroad track which they do not own and the use of valuable terminals, which facilities are used in the handling of the traffic of the entire line. That this contract, or arrangement is valuable, is self-evidence. The appellants said it would be disastrous to their properties if the contract were set aside. Judge Freeman estimated its value at at least $1,000,000. And if this value be added to the $37,243,133.44 and the value of the "seasoning", we have a total of $39,243,133.44, which is an excess over the amount found by the tax board.

As already stated, it is the custom of the Railroad Commission to allow 6 per cent as a general "franchise value". Its valuation (excluding betterments not valued) is $32,471,027.05, and 6 per cent thereof is $1,948,261. This "franchise value", so-called, is allowed for "overhead expenses." (Statement of Facts, p. 373),—that is supervision, etc., and is not in fact intended to be the value of the franchise to be, or the franchise to act, as a corporation. Appellants claim that this value ought to be allowed by the Commission, and Judge Freeman contended 10 per cent ought to be allowed. This item, as allowed by the Commission, is not included in the $37,243,-133.44 shown above, and if it should be added thereto (together with the value of the "seasoning" and the trackage contracts), there would be a total of $41,191,394, or $2,000,000 in excess of the total value found by the tax board.

These various items while included in the "organic unity" value, manifestly, do not include all of the items generally understood to be

included therein. For instance, there is the franchise to be a corporation, recognized everywhere as being a substantial element of value taxable by the State. This element is specially taxed (under Chapter 3, Title 126, R. S. 1911) as to other than railroad corporations.

685 Because the value was intended to be taxed under the Intangible Tax Law, railroads are relieved from the franchise tax eo nomine. (See Article 7403.) If appellants had been subject to this franchise tax they would have paid about $1,500 thereon. This payment capitalized at the State tax rate (55 cents on the $100) would indicate the taxable value thus reached. In addition to the franchise to be a corporation, every corporation has a franchise to act and so universally recognized as a separate taxable value. Practically all corporations are taxed upon this element separately by the State under an occupation or gross receipts tax. (See Chapter 2, Title 126, R. S., 1911.) But because this element of railway values is supposed to be reached under the Intangible Tax Law, railway companies are exempted therefrom by Article 7426. By Chapter 2, Title 126, terminal railway companies are required to pay a tax equal to 2 per cent of their gross receipts, and it is reasonable to suppose that railway companies would have been taxed at the same rate under Chapter 2 if this tax had not been commuted in favor of the ad valorem tax under the Intangible Tax Law. Appellants' gross receipts, averaged, for the last four years were $10,396,079 (Statement of Facts, p. 17); if they had been required to pay a tax thereon equal to that paid by terminal companies, they would have paid for the year in question, approximately, $207,921.58; whereas, on the valuation of $10,743,225 made by the board they were only required to pay the sum of $59,087.74 State ad valorem tax (rate 55 cents per $100). There is no data in the record from which we can tell the amount of county ad valorem taxes which are required to be paid on the $10,743,225, but it is probable, if not certain, that the total State and county taxes to be paid thereon would be very much less than the sum of the payment which would have been made under the Gross Receipts Tax Law. At all events, since the gross receipts tax is, primarily, a tax upon the occupation or the franchise to act as a corporation and since this tax has been commuted, it furnishes some index to the value of the franchise to act as considered by the Legislature. Even if the rail-

686 way company had been taxed on the occupation at only 1 per cent, it would have paid $103,960 State taxes thereby, and this capitalized at the State rate of ad valorem taxation (55 cents on the $100) would have produced $18,900,000. This would indicate that the tax board did not exceed the valuation intended by the Legislature to be placed upon appellants' property.

The Court of Civil Appeals indicates that a capitalization of the net revenues at 7 per cent would show that there were no intangible values to be found, and that, therefore, the valuation made by the board is arbitrary. We mention this here because it not only involves error, but, also, because the principle when rightly applied to the facts indicates an intangible valuation equal to that found by the board. The passage rule quoted by the Court of Civil Appeals

from the Shannon case was not applied by the Supreme Court in that case; on the contrary, the rules laid down by the statute, which, in their nature were contrary to the "net profits rule", were on direct attack, upheld. We believe it proper to suggest that the Legislature would have prescribed the "net profits rule" if it had intended for it to be applied; this it did not do. On the contrary, its application is expressly negatived, unless, of course, the application of such a rule is, in the judgment of the board, demanded by the evidence. On this exact point, on pages 394 and 395, 100 Texas, the Supreme Court said: "If a railroad is bonded for $1,000,000 and its shares at their market value are worth $500,000, it is reasonable to suppose, prima facie, that the property is worth $1,500,000. But for the reason that the shares in a corporation may have a value above what they would have as a profit paying property and its bonds may exceed its entire value, it would be unreasonable to require the taxing board to fix the sum of the bonds and the market value of its shares absolutely as the value. But without entering into a discussion of the provisions of the act in detail, it is sufficient to say that it makes no such requirement. On the contrary, the rights of the companies are carefully safeguarded by providing, in effect, that the board may hear evidence and adopt such other
687 method of determining the value of the intangible assets as they may deem just." This, it seems to us, necessarily means that the board may properly consider the stock of a railway corporation as having a value in excess of its value "as a profit paying property", and since the value of the stock "as a profit paying property" depends primarily upon the "net profits" of the whole enterprise, the Supreme Court in the Shannon case, meant to, and did, hold that the board was free to ignore the "net profits rule" in its valuation either of the "stock" or the valuation of the "entire property". This is also shown, we think, by the fact that the court,—as stated on direct attack,—upheld the rules of the statute, which necessarily in most cases at least the "net profit rule." The court upheld the rule which permitted the board to take the value as assessed in the various counties as the value of the "tangibles"; the statute expressly denied to the county officials the power to consider the "net profits" of the railway in their valuation of the properties in the county because it provided that "intangibles" should be valued alone by the State board. If the statute had not so provided, it is common knowledge that the county officials did not ordinarily consider the question of profits of the entire railway. It is clear, therefore, that there was no relation between the county assessments and net profits; and since the county assessments were authorized to be taken as one of the primary factors in determining the value of intangibles, the "net profits rule" could not be applied under the statute as it then existed. Of course, the discretion of the board has been broadened by the present statute, and the board may consider net profits and may apply the rule if it thinks proper; but there can be found no provision requiring them to do so. To say that the board is bound to apply this rule, is to say that it shall not exercise the discretion expressly vested in it. The supposed showing as to

net revenues, and the supposed result of the application of the "net profits rule" are wholly insufficient, we submit, to condemn
688 the values found by the board.

But the court must have misunderstood the showing of the record as to net revenues; and it assuredly was mistaken in assuming that 7 per cent ought to be taken as the basis of capitalization.

Manifestly 7 per cent is too high a rate of capitalization to be applied in cases of investments as large as that of appellants. This is the current rate on such investments, or loans, as are generally made in this section of the country. It would seem obvious that a loan of $100 or of $1,000 would take a higher rate of interest than a loan of $100,000; and certainly a loan of $100,000 would take a very much higher rate of interest than a loan of $34,000,000 or $40,000,000 would take. No man ever heard of interest being paid on a loan of such large amounts at as high a rate as 7 per cent. No court has ever held a public utility rate to be confiscatory because they failed to permit as much as 7 per cent return on the investment.

The evidence offered by appellants to sustain the 7 per cent rate consisted largely of the testimony of Mr. T. C. Dunn. His direct testimony upon this point is summed up in the following question and answer:

"Question. What would be a fair, conservative income on stocks or bonds or other loans?"

"Answer. Something around 6 per cent or 7 per cent."

(Statement of Facts, p. 121.)

It will be noted that no attention was paid to the size of the investments covered by the question, and, obviously, when the witness answered he had in mind a general average taking into consideration small investments as well as the larger ones with which he may have been familiar. On cross-examination he testified as follows: "That he did not run across sales of stock very often; that he did not think they were sold down here (meaning in Texas) very often; that larger loans carried, as a usual thing, lower interest, and that the largest loan of his bank (Union National Bank of Houston) was $120,000 at 7 per cent, but that he did not think that his bank got more than 8 per cent from anyone; that he had had no
689 experience with loans of several million dollars, and had had no occasion to investigate what interest on them should be, and that as to a loan of $11,000,000 or $10,000,000, his only information would be from reading newspapers and the financial journals; that these large railroad loans carry a lower rate than bank loans, and thought that the rate was between 3 per cent and 5 per cent; * * * that he considered 6 per cent or 7 per cent would be a fair investment return in Texas, but in so stating he had not particular reference ro railroad transactions." (Statement of Facts, pp. 123-124.) This witness, relied upon by appellants, makes it clear that he did not have large railroad investments in mind when he indicated 6 per cent or 7 per cent as a fair return; his testimony would warrant a finding of 3 per cent much more strongly

than it would 6 per cent, and there certainly is nothing therein to justify a finding of 7 per cent. It is needless, we take it, to cite the numerous cases where railroad rates permitting a return of 3 and 4 per cent on the aggregate of stocks and bonds have been upheld.

The "net revenues" of appellants for twenty-five years are shown on page 109 of the statement of facts. For the twelve years from 1903 to 1914, inclusive, these revenues aggregated $19,957,347.36, or an average of $1,663,112.28. This average yearly return, capitalized at 4 per cent, would produce $41,577,805. Mr. Dunn, appellants' witness, said that the rate on such large railroad investments was "between 3 per cent and 5 per cent." We think it fair, therefore, at 4 per cent the valuations for the same years would be: $55,- capitalization. This is assuredly warranted by the evidence, and when it is done a result is produced which more than substantiates the tax board even under the application of the "net profits rule."

The Court of Civil Appeals calls attention to what it supposes to be the net revenues for 1912, 1913 and 1914, capitalizes the same at 7 per cent, and thereby produces the following valuations for the years named in their order, to wit: $29,743,564.28 (1912);
690 $16,523,727.43 (1913); and $934,361 (1914). The basic figures used by the court were erroneous, as will be presently pointed out, but taking them as used by the court, and capitalizing at 4 per cent the valuations for the same years would be: $55,- 089,834 (1912); $28,916,510 (1913); and $1,635,131.75 (1914). But the basing figures used by the court were erroneous. The "net operating revenues" for these three years, before deducting "hire of equipment," taxes, etc., but after deducting "operating expenses," as shown on page 109 of the statement of facts, were the figures set out below in column 1; the "net income available for dividends, and interest" for said years, as shown on page 100 of the statement of facts, are set out in column 2 below:

1912	$2,809,999.14	$2,203,593.36
1913	2,733,085.40	1,668,236.40
1914	1,919,794.25	878,327.60

In reaching the figures shown in column 2 above, Mr. Werner, auditor of appellants, said he had first deducted "operating expenses": taxes, hire of equipment and miscellaneous charges. (Statement of Facts, p. 101.) We shall contend that the figures contained in column 1 are the ones which ought to be used in finding values by capitalization, but if the figures in column 2 are taken for this purpose and capitalized at 7 per cent, the following results will be obtained: $31,479,905 (1912); $23,831,948 (1913); and $12,- 547,537 (1914). Capitalized at 4 per cent the figures in column 2 produce the following valuations: $55,089,823 (1912); $41,705,- 910 (1913); and $21,958,190 (1914), or an average for the three years of $39,584,641. The year of 1914 was an abnormal year for this property for two reasons: The revolutionary conditions in Mexico cost this road about $1,000,000 (see testimony of Mr. Booth, Statement of Facts, p. 56); the great floods of 1913 occurred in the

latter part of the year and the expenses incurred to the road thereby are reflected in the figures for the fiscal year ending June 30, 1914, which is the year covered by the figures shown above; Mr. Booth testified that the damage to the physical properties amounted
691 to about $250,000, and that they lost at least that much more in loss of traffic. (Statement of Facts, p. 57.) These conditions, of course, account very largely for the small gross and net earnings for the year of 1914, and hold the average earnings for the three years down very materially. This, we think, would make it improper to take the earnings for 1914 as a guide.

But we insist that the figures shown in column 1, above, should be taken as the basing figures in any application of the net income theory. These figures represent what was left after all "operating expenses" had been deducted. Taxes and "hire of equipment" are not operating expenses; they are not so classed by the Interstate Commerce Commission, or any of the State Commissions. Taxes are not taken into account in arriving at the value of the stocks of the merchant. If it were proper to take taxes into account in arriving at taxable values, there would be much substantial property which would escape the burden altogether, especially under the application of the income rule. The easiest illustration of this would be unused real estate. "Hire of equipment" should not be taken into consideration in arriving at value for the reason that it is a capital charge, so recognized by the State and Federal governments. It is a rental paid for leased property, and it has no relation to the value of the property owned by the lessee. A certain man owns one farm and cultivates it; he also leases another farm from his neighbor and cultivates it; the question of the valuation according to income of his owned farm arises; obviously it would be entirely improper to deduct the amount of rents paid for the leased farm from the gross revenues in finding the value of the "owned" farm.

But there is a reason shown by the record without dispute which renders it unjust to day that the board acted arbitrarily in not applying the net revenue rule. In measuring the conduct of the board it would appear to be fair to say that it should be judged, in this respect, according to the facts before it at the time of the final hearing. It would also appear to be reasonable to say that any
692 tribunal should have evidence before it leading it to the belief that an enterprise has been well managed before it should apply the net profits rule. There was absolutely no evidence offered to the board to show that the I. & G. N. properties had been properly managed. The entire proceedings before the tax board are set forth on pages 37 to 70 of the statement of facts, and not one word of evidence or argument can be found therein that in any way indicates proper management of the properties. But in a general way the history of the enterprise was shown, and it certainly justified the assumption that the property had been grossly mismanaged in the absence of a showing to the contrary. The testimony as to "good management," such as it is, came into the record for the first time at the trial of this case; it was not before the board at all. The record affirmatively shows that Mr. Bagby, at least, thought the road was

mismanaged. (Statement of Facts, p. 353). If appellants thought that the "rule of net profits" ought to be applied it was clearly their duty to show the board that the property had been properly managed; this they failed to do. It would appear to be the essence of injustice, therefore, to say that the board acted arbitrarily in failing to adhere to this rule when the main and basic fact was not proved, or offered to be proved, and when it had good reason to believe, and did believe, that the property had been mismanaged.

The showing made in the trial court as to "good management" is exceedingly shadowy. It consisted entirely of the expression of opinion by two or three witnesses in the employment of the appellants to the effect that the property had been carefully and skillfully managed. What does such expressions of opinion prove? Would it be reasonable to suppose that the men who are hired to manage a property of this kind would say that it was being mismanaged? Are such self-serving declarations by vitally interested parties to be taken as evidence competent to show a material fact? We think not; we submit that facts, and not self-serving opinions, should be taken upon this point. At all events, even this opinion evidence was not placed before the board, and until proper management was shown the board, we think, would have been justified in disregarding
693 the "net income rule" if in fact it had done so. But the evidence shows that the board considered the matter of net income for what it may have been worth; just what weight was given it by the board is not disclosed by the record.

As to the Value of the Stock Separately Considered.

The stock of the corporation was not for sale. It had never been on the market. It had no market value. The board had a right to consider and find its real value. That it might have a value in excess of market value, or par value, or "value as a profit paying property," was held by the Supreme Court in the Shannon case. That it did have a value in excess of its par value and in excess of its "value as a profit paying property" is conclusively and clearly shown by the evidence. The evidence as to the value of the "entire property" has been set out and discussed above. That the stock was worth the difference between the indebtedness and the entire value of the property is a proposition which cannot be doubted. That it has such a value, and a value approximating that ascribed to it by the board, was testified to by the financial experts placed upon the witness stand by appellants in an effort to prove it to be worthless. (See testimony of W. D. Sherwood, Statement of Facts, pp. 127-128).

But if the valuation of the stock, separately considered, were excessive, this, we think, would be immaterial so long as the final results of the valuation are correct, or rather, so long as there was substantial evidence to warrant the board's finding as to "tangible" values and as to the value of the entire property. For the valuation of the stock separately, under the statute, is simply a means to an end. It might be undervalued or overvalued, and the result might be correct. The evidence showing, as it undoubtedly does, that the

board was warranted in taking $28,372,810 as the value of the tangible properties and $39,116,033 as the value of the "entire properties," the resulting valuation derived by subtracting the "tangible" valuation from the valuation of the "entire properties," the
694 board's action stands unimpeached, even though it were conceded that there was error in the calculation of the value of the stock separately. Suppose the board had said that the stock is worth $100 and the bonds are worth $39,115,833, and, therefore, that the "entire properties" were worth $39,116,033; if the "entire properties" were in fact worth $39,116,033 what difference would it have made to appellants? The result to appellants would have been exactly the same if the board had said that the stock is worth $30,000,000 and the bonds are worth $9,116,033, and, therefore, the "entire properties" are worth $39,116,033, if in fact the "entire properties" were worth that sum. The fact is undisputed that the tax board, after considering all of the evidence, thought that the "entire properties" were reasonably worth $39,116,033 without regard to the value of the stock separately considered. This very clearly appears in the testimony of Mr. Bagby, the only witness upon the subject and the only witness who was in a position to know what the board considered and how its judgment was formed.

As to the Formulæ.

Much has been said about the "formulæ." Appellants' whole case is largely based upon supposed mathematical errors in the processes of the formulæ. Not much attention has been paid to the question of whether or not correct results were reached by the board. It seems to have been assumed that the formulæ controlled the judgment of the board and that it necessarily led to the wrong results. Neither assumption, we think, is well founded.

Mr. Bagby says that the formulæ were private memoranda gotten up by him in an effort to give the carriers a mathematical process by which the results could be figured out. Whether the other members of the board even considered the formulæ or not is not even shown, nor, apparently, did the appellants deem this at all material. The other members of the board were tendered to appellants for use as witnesses, but they were not put on the stand. That the
695 formulæ neither controlled the judgment of the board nor led to incorrect results is, we submit, conclusively shown by the record.

The only connection of the formulæ with the valuation is that they were given out in connection with the "preliminary valuation." After that, and when the matter came on for final hearing, the board heard and considered all evidence and argument offered and in the light of the evidence and argument considered the question as to the correctness of the valuation of "tangibles" and the valuation of the "entire properties." That the formulæ controlled the judgment of the board at the final hearing is negatived by every piece of evidence in the record pertaining to the matter. Mr. Bagby testified that the board considered all evidence before it as to the two

factors just mentioned and that the valuation of the tangibles and the valuation of the entire properties represented its "best judgment upon all the information" before it. He also said that "disregarding the mathematical calculation" the "valuation represented the best judgment of which he was capable under all the information he had." (Statement of Facts, p. 343.) He expressly said that after the promulgation of the formulæ the board "took into consideration the evidence that was offered by the railway company at its final hearing." (Statement of Facts, p. 349.) He also said: "That each of the railroads filed their reports in forms similar to those of the I. & G. N. and T. & P. and had done so for five or six years back. That the board considered these reports and the information in them * * * and that he considered the I. & G. N. reports and former valuations made by the board of all railroads, and got information from any source where he could find it, and considered all the evidence and argument offered by council for the railroads, and their witnesses, and that the final valuation in each instance reflects the witness' honest judgment as to what the evidence showed the values to be. * * * That after hearing the evidence and those statements, the board decided, in their best judgment, that some of them should be reduced, and that the witness concurred in such decision, because of the effect of the evidence on his
696 mind. That he understood the law required him to consider the evidence, that he did so to the best of his knowledge and ability. That the board applied the formula, and if it resulted in what they thought, in their best judgment, was correct, they let it stand; that if the board decided, after the evidence was in, that the formula did not reflect what one would call the best judgment of the board, then the board changed it." (Statement of Facts, p. 365.) This testimony, which is not at all contradicted by anything this or any other witness said, shows, we say, that the board, in the final valuation, considered all evidence and information in its possession upon the question as to the correctness of the results reached by it. If the results reached by the formula reflected what, in the judgment of the board, were the correct results, they were allowed to become final; if the evidence showed that the results reached by the formula were incorrect, then the results were changed accordingly. What more could have been done? It was the evidence, and not the formulæ, that determined the final results. What difference would it have made if originally the board had multiplied four dogs by five cats and reached a certain result in dollars, provided that the result thus originally reached through incorrect mathematics was, on the final hearing, shown by the evidence to be substantially correct? The results independently considered, in the judgment of the board, based upon a consideration of all evidence, were correct; would it have been of any benefit to the appellants for the board to have entered a formal order saying that the formula was incorrect and that it was repudiated, but that the resulting valuations were correct and would be adhered to? If there is substantial evidence to indicate that the valuation finally made by the board is approximately correct, it seems like quibbling to say that the errone-

ous processes of the formulæ produced substantial injury. We submit that the evidence set out and discussed above clearly warrants the findings of value made, and that any error in the mathematical processes were harmless and such as to leave the action of the board unimpeached.

697 Generally, the Burden of Proof.

We have heretofore discussed the matters involved as if the burden rested upon the appellees to show sufficient evidence to support the judgment of the tax board. Even if the burden of proof were so placed we are confident that the undisputed facts set out above would be sufficient. But, clearly, the burden is upon the appellants to show by satisfactory proof that the facts did not exist to support the valuation. The tax board was acting on a matter within its undoubted jurisdiction and confided to its discretion. Its order is at least prima facie valid. The appellants level an attack upon it because of matters not appearing in the face of the final order, and it would seem superfluous to cite authorities to the proposition that the burden is upon them to negative by affirmative and competent proof every lawful hypothesis upon which the board may have proceeded. Nevertheless, we desire to cite and briefly discuss some authorities which we regard as being closely in point.

Fraud with bad intent is not seriously charged, if charged at all. Even if charged, no reasonable man can contend that there is any evidence to support the allegation. The district court of the United States has passed upon the exact state of facts presented here, and repudiated any suggestion of fraud; the trial court expressly found that there was nothing upon which to base such a charge; the Court of Civil Appeals negatives its existence. All that is left is a charge of excessiveness of valuation, which, according to appellants, amounts to legal fraud or a showing of arbitrariness. We have set forth evidence which in our judgment affirmatively disproves either excessiveness or an arbitrary spirit. But if this had not been shown, appellants still would have made no case.

A very similar attack, upon a very similar state of facts, was made upon the valuation in Ry. Co. vs. Backus, 154 U. S. 421. In that case the railway company reported its property values as being about $8,000,000; it had been assessed for the previous year
698 at $8,538,053; the tax board increased this assessment to the sum of $22,666,470, an increase of about 150 per cent; the values of other railways were increased by only 43 per cent; upon the hearing before the board the railway company proved up its net and gross earnings, and the per cent of return on the property on a valuation of about $8,000,000; the members of the tax board did not inspect the property nor did they examine any person acquainted with the value thereof. The tax board only called one witness upon the trial, one of its members, and he simply testified that no property located outside of the State was included in the valuation. Thereupon the Supreme Court said:

"Upon this testimony the decision of the court was that there was nothing to impeach the assessment made by the State board, and in this conclusion we concur. The true cash value of the plaintiff's property in the State of Indiana in the year 1891 was a question of fact, the determination of which for the purposes of taxation was given to this special tribunal, the State board. Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the State board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board. It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determination. It is not, however, contended by counsel that there was any actual fraud on the part of that board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact
699 bore, and did so with the purpose of making the plaintiff bear a larger share of the burden of the support of the State government than it rightfully should. The contention is rather that the board made a grievous mistake in placing so high a value, and that it took into consideration property outside of the State, and gave to the property within a value partly deduced from that without the State. The testimony, however, does not sustain this contention." Ry. Co. vs. Backus, 154, U. S. 434-435.

In Maish vs. Arizona, 164 U. S. 599, 610, the Supreme Court said that in a case like this, "Something more than an error of judgment must be shown, something indicating fraud or misconduct." And because of the analogy of questions there and here presented we quote the following from the opinion:

"There is nothing tending to show that the board, in fixing the value of cattle at $7.42, acted fraudulently or with any wrongful intent, or that that valuation was not the result of its deliberate judgment upon sufficient consideration and abundant evidence, and it would be strange, indeed, if an assessment could be set aside because a single witness is found whose testimony is that the valuation was excessive. No assessment could be sustained if it depended upon the fact that all parties thought the valuation placed by the assessing board was correct. Something more than an error of judgment must be shown, something indicating fraud or misconduct. Neither is the fact that an officer of the railroad company came before the board and declared its willingness to pay taxes on a certain valuation and its intention to resist the payment of taxes on any higher

valuation sufficient to impute fraudulent conduct to the board, although it finally fixed the valuation at the sum named by the railroad company. It appears from the testimony of one of the members of the equalization board that it was guided largely by the valuation placed in other States and Territories upon railroad property, and that from such valuation, as well as from that given by the railroad company, it made the assessment at something like the
700 average of the valuation of railroads in the various States and Territories named. It is unnecessary to determine whether this board erred in its judgment as to the value of this property, whether it would not have been better to have made further examination and taken testimony as to the cost of construction, present condition, etc. Matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its judgment cannot be overthrown. Pittsburg, Cincinnati, etc. Ry. Co. vs. Backus, 154 U. S. 421-435." Maish vs. Arizona, 164 U. S., 610-611.

Perhaps the loudest note in the roar of excessiveness is that produced by the supposed condition of bankruptcy. Appellants seem to think that because they have shown that the I. & G. N. is at its old habit of receiverships they have conclusively shown that the valuation is so grossly excessive as to render it void. A companion tune was played by the railway in Railway Tax Cases, 92 U. S. 575, 606. The Supreme Court stated the facts relied upon and disposed of the complaint as follows:

"The case of Toledo, Peoria, and Warsaw Company, as we have said, is used as an illustration of the inequality which this rule works, and which counsel say is forbidden by the Constitution of the State, thus rendering the tax assessed against it void. That company is insolvent, and in the hands of a receiver. It is unable to pay any interest on its bonds. Its capital stock is of no value. But the board of equalization assessed the capital stock and franchise at $2,003,415, and its tangible property at $2,629,367, thus assessing a property which pays but little, if anything, beyond its running expenses, at the sum of $4,632,782.

"This sounds plausible; but it is nothing more Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable,—there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of
701 the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this is of no value,—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling stock, and other tangible

property? Is it supposed by anyone that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose.

"It is this franchise which the Legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debt, who shall say that it is not worth $2,000,000, and who shall say that such is not the real value now of this franchise?" State Railroad Tax Cases, 92 U. S. 606-607.

In Lufkin Land & Lumber Co. v. Noble, 127 S. W. 1096, 1097, the contention was made that since the board of equalization
702 had adopted a rule for the assessment of real estate generally whereby it was to be assessed at "two-thirds of the fair cash market value" and not the "full cash market value", and since the lumber company had proved, without dispute, before the board what two-thirds of its values were, and since the board "had knowingly, arbitrarily and fraudulently" raised its lands above two-third of their value, the board had unlawfully discriminated against the company and the assessment was void. The Court of Civil Appeals disregarded the supposed effect of the "two-thirds rule" adopted by the board, it not having been shown upon the trial of the case that the lands were, as a matter of fact, assessed too high. The court said: "The question really was first whether it was overruled or whether the court (board) discriminated against appellant as complained of, and these facts had to be established before the court trying this case." That is to say, it was held that the plaintiffs had to show that as a matter of fact their lands did not have the value ascribed to them by the board; the mere fact of the existence of the "two-thirds rule" was insufficient, in the absence of a showing that the results, not the manner of reaching the results, had produced injury; in order to show injury from the results, plaintiffs were compelled to show that the lands really had no such value as found for them.

Tenth Assignment of Error.

Since the State Tax Board, and no other official or body, representing the State of Texas as a whole is not a party to the litigation;

since the State Tax Board has long since performed all of the duties laid upon it by law, and has certified the results of its valuations to the various counties, and had done so long before the filing of this suit; and since it was the duty of the appellants to enjoin said board from certifying said valuations before it did so, if there was error therein so that such error could be corrected; and since appellants attempted in the Federal courts to secure such injunction and abandoned the attempt; and since the result of a successful
703 attack upon such valuation in this suit to which only the taxing authorities of Harris county are parties defendant would nullify the valuations certified by the State Tax Board to some thirty-six counties and thus deprive each and all of such counties of such taxable values and also deprive the State of the whole of such taxable values, there is a fatal defect of parties, and the appellants are concluded from making such attack in this case, and, therefore the Court of Civil Appeals erred in reversing the judgment of the trial court and in rendering judgment for appellants.

Statement.

Neither the State of Texas, nor any of the interested counties, are parties to this cause. The State Tax Board is not a party, nor is any State officer a party, nor are the officers of any county, except Harris county, parties.

As shown above, the defendants in error, on July 5, 1915, and before the valuation made by the tax board was certified to the various counties, filed a suit in equity in the district court of the United States at Houston against the tax board and the members thereof, seeking to have the valuation set aside in whole, or, in the alternative, seeking to have it reduced. (Tr. p. 22 et seq.); the same allegations were made as to the invalidity of the valuation as are made here. (Tr. p. 22 et seq.) The case in the Federal court came on for hearing on the application for temporary injunction on July 15, 1915, and the hearing continued until July 20th, when the court entered proper orders denying the application for lack of equity and because the valuation stood unimpeached. (Tr., pp. 29-30); while this was a hearing for temporary injunction, the merits of the case were fully gone into and defendants in error introduced practically all the evidence there which was introduced in the present case with respect to the validity of the valuation, and thereupon Judge Burns ruled against them as shown above. After the denial of the application for temporary injunction by the Federal court, and without
704 notice of any kind to the tax board, or anybody else interested in the matter, defendants in error procured an order in the Federal court dismissing the suit without prejudice, and thereafter the board certified the valuation, and thereafter this suit was filed. With the State Tax Board as parties defendant in the Federal court the validity of the valuation could have been tested in a direct proceeding, and if erroneous it could have been corrected and the rights of the State and of all the counties could have been protected. But defendants in error, having refused to litigate the matter in a direct

proceeding, now in a collateral proceeding is allowed, by the Court of Civil Appeals, to have more than $10,000,000 of taxable values wiped off the tax rolls, although Harris county is only interested in $603,000 thereof.

Authorities.

Texas Co. vs. Daugherty, 160 S. W., 129;
Renshaw vs. Arnett, 158 S. W., 1197,
Raley vs. Bitter, 170 S. W., 857;
State, ex rel. Stone vs. Christian County Bank (Mo.), 136 S. W., 335.
And cases cited on page 336, 136 S. W.
Bradford vs. Westbrook, 88 S. W., 382.

Eleventh Assignment of Error.

The basis of the equitable relief prayed by appellants being alleged discrimination against them and in favor of other property taxpayers in Harris county, and thus an alleged violation of the uniformity and equality clauses of the Constitution being presented, and it being true, as found by the trial court, that the whole of appellants' property, taxable in Harris county, has not been valued for taxation at a greater proportion of its value than other property in the county generally, no right to equitable relief has been shown.

The pleadings of appellants upon this branch of the case are found in subdivision III of the petition beginning on page 23 of the transcript. It is alleged that there exist a scheme and custom, and the same *has* existed for a number of years, in Harris county, whereby the taxing officials of that county "permitted that the property taxable within the county should be assessed, valued, equalized
705 and placed on the tax rolls for taxing purposes at not exceeding 38 per cent of its true value and of its true cash and market value, and far below the same, with the exception that the intangibles, if any, of railroads should be valued as certified by the State Tax Board, and with the further exception that large amounts of money and of notes and accounts, stocks, bonds and loans, and bills receivable, household furniture subject to taxation and other personal property were understood, agreed and permitted not to be taxed at all, and that taxation thereof was purposely permitted to be avoided, except as to relatively small amounts, the system being to permit this class of capital to escape taxation, and with the further exception that the tangibles of this railroad taxable in this county were assessed and valued at a higher rate than the rate adopted for the valuation of the tangibles of other property taxable in this county; and that not less than one-half of the property in this county, subject to taxation, thereby escapes all taxation," and that the acts of the local officials, in this connection, "were intentional and arbitrary," and thereby appellants were "unjustly, arbitrarily and illegally discrimiated against." (Tr. pp. 23-24.) Wherefore, appel-

lants prayed that the valuation of intangibles apportioned to Harris county be reduced to the proportion thereof corresponding to the proportion of assessed to real value of other property in the county. (Tr. p. 24.)

The appellees answered this branch of the case as follows:

With a general denial. (Tr. p. 40.)

With further answers, as follows:

"They especially deny the material allegations contained in subdivision III of said petition.

"They especially deny that the intangible values of the International & Great Northern Railway Company, as found by the State Tax Board, are in excess of the true value of its intangible assets, but, on the contrary, they say the real sum of the values is what is called the 'physical properties' and of what is called 'intangi-
706 ble assets' far exceed the sum of the total assessments of said properties, and that the real value of what is called the intangible assets far exceed the amount thereof found by the State Tax Board.

"They especially deny that there was any scheme or plan in existence in this county whereby 'it was agreed and understood or permitted that the property taxable within the county should be assessed, values equalized and placed on the tax rolls for taxing purposes at not exceeding 38 per cent of its true value and of its true cash and market value, with the exception that the intangible, if any, of railroads should be valued at their full value, as certified by the State Tax Board, and with the further exception that large amounts of money and notes and accounts, bonds and loans and bills receivable, were understood, agreed and permitted not to be taxed at all, and the taxation thereof was purposely permitted to be avoided, except as to relatively small amounts, the system being to permit this class of capital to escape taxation, and with the further exception that the tangibles of this railroad taxable in this county were assessed and valued at a higher rate than the rate adopted for the valuation of the tangibles of other property, taxable in this county; and that not less than 38 per cent of the property in this county, subject to taxation, thereby escapes all taxation,' as alleged in sub-paragraph (1) of subdivision III of plaintiffs' petition, and especially deny all material facts in said subdivision alleged, and say that, on the contrary, that the property of the plaintiffs, including their intangible assets, were not assessed for taxation in greater proportion to their real values than other property in the county was assessed, and the intangible assets of the plaintiffs, considered alone, were not assessed at a great-proportion of their real values than other property in the county, and therefore, that plaintiffs were not discriminated against as alleged by them.

"Defendants say in the alternative, that if it should be
707 true that such a scheme and purpose did exist, the plaintiffs themselves were and are parties to it, helped to create it and assisted in carrying it out for the purpose of securing a grossly inadequate valuation and assessment of their properties in said county,

and thereby, or in some other manner, did secure a grossly inadequate valuation and assessment of their properties in the county and an assessment thereof at a value much less than the real value thereof, and an assessment thereof at a value much less than said 38 per cent of the real value thereof, and that as a result of such conduct upon the part of plaintiffs said county and its taxing subdivisions, and the State of Texas have been or will be deprived of a great amount of revenue to which they are entitled from plaintiffs. And in this connection defendants show unto the court the following:

"First. That by laws of the State the plaintiffs were required to file a statement or list, under oath, of their properties in said county therein stating the 'full and true value' thereof, the purpose of said statement being to assist the county taxing authorities in arriving at the correct assessment of such properties, and to furnish data therefor; the plaintiffs knew that the taxing authorities of said county were not in a position to know the 'full and true value' of railroad property, and that they would be, and were compelled to accept, or rely upon, such statement, and they did, at least to a large extent, rely upon the truthfulness thereof.

"Second. That the plaintiffs did file such a statement under oath stating the value of such properties in such county to be, approximately, the sum of about $964,275, and such taxing authorities were compelled to, and did, rely at least to a large extent, upon the accuracy of such statement, and the contends thereof and the same resulted in the assessment of such properties in said county at $823,-672 (about), which sum is much less than the 'full and true value' thereof, and which is less than 38 per cent of the 'full and 708 true value' thereof.

"Third. That the plaintiffs well knew, or should have known, at the time that such statement was filed, and at the time that such assessment was made, that the statement of the value of such properties in such county was much less than the 'full and true value' thereof, and was less than 38 per cent of the full and true value thereof, and that such statement was likely to and probably would and did, to a large extent, cause such properties to be assessed for taxation at an amount much less than the 'full and true value' thereof.

"Fourth. That, therefore: (*a*) The plaintiffs have not done, or offered to do, equity in the premises, and do not come into this court seeking equity with clean hands; and

"(*b*) By reason of the premises the plaintiffs are now estopped to plead the matters set forth in subdivision III of their petition or to secure any relief thereon.

"Wherefore, defendants pray that the plaintiffs be held estopped to plead the matters set forth in their said petition and to secure any relief therein, and that this cause be dismissed, and especially so as to the third subdivision of said petition." (Tr. pp. 40-43).

The findings of fact and conclusions of law filed by the trial court upon this branch of the case are as follows:

"Conclusions of Fact.

"In making the findings of value as hereinafter stated, I have adopted the valuations of the properties of plaintiffs made by the Railroad Commission of Texas from time to time as the basis, believing from the evidence that it is just to do so; in doing so, however, I realize from the evidence that the values of real estate along the lines and in the neighborhoods of the plaintiffs' properties have substantially increased in value since the dates of such valuations by the Railroad Commission, and if it should be proper to allow, therefore as to right-of-way and other real estate belonging to plaintiffs the valuations found therefor by me would be sub-
709 stantially increased; I have departed from the Railroad Commission's valuations of real estate in certain instances hereinafter noted and allowed for the values of certain real estate as they existed on or about January 1, 1915, minus the values allowed therefor by the Railroad Commission, for the reason, in such cases, such real estate is reasonably adapted to use for general commercial purposes and the possibility of its use is not confined to railway purposes.

"The physical properties of plaintiffs in Harris county,—including the rolling stock apportioned to said county on the mileage basis, were rendered and assessed for the year of 1915 at the total sum of $1,106,105.

"The valuations placed by the Railroad Commission of Texas on the same properties aggregated the sum of $2,009,822.09, and including rolling stock apportioned to Harris county, aggregated the sum of $2,331,822.

"Since the valuations by the Railroad Commission additions and betterments have been made to said properties in said county to the extent of approximately $400,000.

"In adopting the above figures, as representing the value of said properties in said county on January 1, 1915, I have allowed nothing for increase in values of road, roadbed, structures, or real estate,—except the particular items of real estate next mentioned,—although the evidence tends to show that abutting property, and real estate generally, along the route of the line of plaintiffs' railroad, have substantially increased in value since the dates of the Railroad Commission's valuations.

"The plaintiffs hold certain real estate in and near the city of Houston which is suitable for general use and purposes and all of which is not actually being used for pure railway purposes, reasonably calculated for railroad purposes and reasonably held therefor, and as to this real estate I allow additions to the above figures measured by the difference of the amounts allowed by the Railroad Commission in its valuations therefor and their value about January 1, 1915.

710 "I allow $208,380 difference between present value of 94.6 acres of land on and near the turning basin and value allowed by the Railroad Commission.

"I allow $90,000 for such difference with respect to a 19.9-acre tract just north and adjoining Buffalo Bayou in the city of Houston,—same being shown on engineer's map No. 38-*b* in evidence; I also allow $100,000 for such increased value of portions of parcels 4, 4*a*, 3, 8, shown on engineer's map No. 38-*b*.

"I allow $75,000 for such increased value for certain real estate marked "D" on engineer's map S-1-*a*.

"The total value found by me on these bases of the tangible properties of plaintiffs in Harris county on January 1, 1915, and subject to taxation is, therefore, the sum of $3,205,202.09. This property was rendered and assessed for taxation at the sum of $1,106,105, or at about 34 per cent of its real value as found. The intangible values apportioned to Harris county by the State Tax Board is the sum of $603,227.44, making the total taxable values for the year of 1915 the aggregate sum of $3,809,379, which aggregate values were assessed at the sum of $1,709,332, or about 45 per cent of their values as found. If the aggregate of these values,—that is, of tangibles, intangibles and rolling stock,—had been assessed at 50 per cent of their said values they would have been assessed at the sum of $1,904,689.

"Conclusions of Law.

"The evidence shows that the tangible properties of the plaintiffs subject to taxation in Harris county were for the year of 1915 assessed at a proportion of their true values lower than the proportion of assessed to true values of property generally, and sufficiently lower to more than make up for any discrimination against plaintiffs by reason of their intangibles having been assessed at full value, if they were so assessed; in other words, the total properties of plaintiffs in Harris county,—tangible, rolling stock and intangible,—as assessed for 1915, were assessed at less than 50 per cent of their real
711 true values, while other property in the county generally was assessed at at least 50 per cent of its true value; I conclude, therefore, that plaintiffs have not shown themselves entitled to the relief prayed for by reason of the allegations contained in subdivision III of their petition." (Tr. pp. 83-86.)

Briefly to restate from the record the reason why it was held that appellants had not shown themselves entitled to relief on this branch of the case: (1) Property generally in the county was assessed for taxation for the year in question at 50 per cent, or more, of its value; (2) appellants' property, including physicals, rolling stock and intangible value certified by the State board, of aggregate value of $3,809,379, was actually assessed at $1,709,332, or at about 45 per cent of its value. If it had been assessed at 50 per cent of its value,—as other property was assessed—it would have been assessed at the sum of $1,904,689, instead of at the sum of $1,709,332.

Appellants, in their brief, make no attack upon the findings of fact or conclusions of law filed by the court, and we, therefore, assume that it is unnecessary to point out the evidence sustaining the findings. Some of the evidence upon which these findings were made is set forth on pages 55 to 66 of appellees' brief in this case, and reference is here made thereto.

Authorities.

M. K. & T. Ry. Co. vs. Hassell, 123 S. W., 190;
C., R. I. & G. Ry. Co. vs. Ratliff, 177 S. W., 571.

Your petitioners respectfully pray that this petition be granted and the writ of error allowed for the correction of the errors of law herein complained of; and that upon hearing the judgment of the Court of Civil Appeals at Galveston be reversed and the judgment of the district court of Harris county be affirmed in whole.

In the alternative, petitioners pray that the judgment of the Court of Civil Appeals be reversed and the judgment of the district
712 court of Harris county be reformed to such extent as may be required by the record and the law, and that the same, as reformed, be affirmed.

Respectfully submitted,

B. F. LOONEY,
Attorney General;
LUTHER NICKELS,
Assistant Attorney General;
FISHER, CAMPBELL & AMMERMAN,
SEWELL MYER,
Attorneys for Plaintiffs in Error.

Endorsed: App. No. 10577. No. 3272. In the Supreme Court of the State of Texas. Karl L. Druesdow et al., plaintiffs in error, vs. James A. Baker, receiver, et al., defendants in error. Petition for writ of error. B. F. Looney, Attorney General, Luther Nickels, Assistant Attorney General, Fisher, Campbell & Ammerman, Sewell Myer, Attorneys for Plaintiffs in Error. Filed in Court Civil Appeals Nov. 1, 1917. H. L. Garrett, Clerk. Filed in Supreme Court, Nov. 8, 1917. F. T. Connerly, Clerk. Granted 3-19-1919.

Answer to Petition for Writ of Error.

Filed November 13, 1917.

In the Supreme Court of Texas.

No. —.

KARL L. DRUESEDOW et al., Plaintiffs in Error,

vs.

JAMES A. BAKER, Receiver, et al., Defendants in Error.

Answer to Petition for Writ of Error of the Plaintiffs in Error.

NOTE.—We do not waive having this case set down for argument, nor our right to a submission, in open court, in the event that a writ of error should be granted; but we especially reserve that right, in accordance with the provisions of Rule 5 of this court. (Morris' Rules of The Courts, pp. 7 and 8).

713

This answer is not complete. We stand not only upon it, but also on our briefs on file, to wit, (*a*) original brief, filed in the Court of Civil Appeals; (*b*) our reply to the brief of our opponents, filed in the Court of Civil Appeals; (*c*) our answer to motion for re-hearing, filed in the Court of Civil Appeals. The issues of fact advanced in the petition, and for a great part no issues at all—but myths—have been settled by the Court of Civil Appeals. We cannot again go through the vast Statement of Facts—made on a month's trial.

We confine ourselves to comments upon some of the positions taken in the petition, which repeats mis-statements of fact in the motion for re-hearing. The court gave a second opinion. These matters we consider settled by the Court of Civil Appeals, it being the peculiar duty of that court to sift the enormous mass in the Statement of Facts, and to bring forth the truth. This it has done, and this court will not, therefore, much concern itself, we presume, over the attempt made to rethresh that straw.

As to the attempts to influence this court (for we so construe them) by attacks upon the honor of honorable men, and by appeals to prejudices, we do not concern ourselves further than to state below what we believe to be due them, for we consider that no prejudice exists here. The same attacks have been made in the Court of Civil Appeals.

I.

We present first that there is no basis for granting a writ with a view to reversal of this case, but that if any ground there is (which we deny), then only with a view to reforming or affirming the trial judge whose decree was reversed and rendered by the Court of Civil Appeals.

The basis for the petition, and the measure of the relief, if any, in the Supreme Court, is the motion for rehearing in the Court
714 of Civil Appeals. No relief can be obtained here which does not come within the limits of that motion. (Rule 1-C, Rule of S. C.-Harris, p. 1.) If there had been a complete motion, there would be no basis for any relief upon the merits. But our opponents are limited to the scope of their motion for a re-hearing. For it is to be presumed that that court would have given due relief, were there any, if that relief had been asked. For reasons satisfactory to themselves our opponents invoked, from the Court of Civil Appeals, only an affirmance, or a reformation of the decision of the trial court. They did not desire a reversal for the purpose of correcting any errors, but claimed either affirmance or a reformation and affirmance. At the head of the motion they moved for an affirmance alone. Their prayer at the end of the motion is: "Wherefore, appellees pray that the judgment rendered by this court in this cause on the 21st day of June, 1917, be set aside, and that the judgment of the District Court of Harris County be in all things affirmed. In the alternative, and in the event that the court does not believe that the judgment of the District Court should be in all things affirmed, then appellees pray that the same be reformed as may be required by the facts of record, and as so reformed that he be affirmed." (End of motion for re-hearing.) In our answer to this motion (No. 3, above, page 9), we pointed out that the appellees nowhere pray or invoke the action of the court for a reversal of the cause, but stand upon their contention that the judgment should be affirmed (which was impossible), or that if it should not be affirmed, it be reformed; and pursuing this matter, on pages 10 and 11, and into page 12, we emphasize our position, insisting that the court has been correct in reversing and rendering the case, and in finding that we had no intangibles, but that it was only open for the court to affirm or reform the case, for the motion for re-hearing went no further. We took the position that no intangibles could exist, but, coming within the scope of our opponents' motion, informed the court that if it could find and define in the evidence intangibles of any value (we cannot and the court could
715 not) then, all the evidence being in and none excluded, it was for the court to find and value them; but at the same time we insisted upon the correctness of the judgment of the Court of Civil Appeals, and contended that it was correct and should stand.

On this motion and answer the Court of Civil Appeals are presumed to have done only what they were requested to do, i. e., searched the motion to see whether or not it pointed out any error which would be the *basis of affirmance or reformation;* the court would not, we presume, search for error *which would be the basis of reversal.* That was excluded by the motion.

Those, against whom a case has been reversed and rendered, filing a motion for re-hearing in the Court of Civil Appeals may ask as they please: either (*a*) that the case decided in their favor be affirmed and the judgment of the Court of Civil Appeals set aside; or (*b*) that the judgment of the Court of Civil Appeals be set aside

and that of the District Court in their favor be reformed, which would here mean reduced; or (*c*) that the judgment of the Court of Civil Appeals be set aside as going too far in rendering the case, and that the case, if not reversed or reformed, be reversed with the correction of such errors as had been committed against the appellants in whose favor the case had been reversed and rendered, but leaving an hypothesis of recovery. Under conditions, under which our opponents were, it would have been allowable for them to appeal to the court generally, or to ask this relief in the alternative, (*b*) in the alternative to (*a*), and (*c*) in the alternative to (*a*) and (*b*). Our opponents ask for (*a*), and (*b*) in the alternative to (*a*), but do not desire (*c*) in the alternative to (*a*) and (*b*). In their petition here they take this same position. Their petition ends the same way: "Your petitioners respectfully pray that this petition be granted, and the writ of error allowed, *for the correction of the errors of law herein complained of;* and that upon the hearing the judgment of the Court of Civil Appeals at Galveston be reversed, and the judgment of the District Court of Harris county be
716 affirmed in whole." "In the alternative, petitioners pray that the judgment of the Court of Civil Appeals be reversed and the judgment of the District Court of Harris County be reformed, to such extent as may be required by the record and the law, and that the same, as reformed, be affirmed." The words in italics in the petition for a writ of error, but not in the motion for re-hearing, we consider that in their context, in the petition for the writs, that they make no difference; but the measure is the motion for rehearing. There they are omitted, and the motion limited to those matters which might lead to an affirmance or reformation. No court can grant relief which is not asked. Our opponents have seen fit to limit their petition, but it will be the same as if they had not limited it, because their application cannot be more extensive than their motion for a re-hearing. To suppose the contrary will be to suppose an attempt to clothe this court with a jurisdiction which the Court of Civil Appeals was not asked to exercise, and which it was not desired, we presume, that it should exercise. This view may have been taken by that court, for it considers no point, in the second opinion, which would lead to a mere reversal.

It is not, therefore, before this court to grant a writ or error upon the theory that error of such a nature may have been committed as will require a new trial, because our opponents desire no new trial. Therefore, this court cannot grant a writ of error with such view. The greatest extent to which the jurisdiction of this court is invoked is to grant a writ of error with a view of affirming the action of the District Court in toto, a thing so unreasonable as to require no debate, and as will appear upon an inspection of our briefs and the strong opinions of the Court of Civil Appeals; or, to reform the trial court's judgment here, with the view of entering a smaller judgment for the plaintiffs in error. Our difficulty as to the first is to show that the astonishing things were done, and the positions taken in the District Court which were done and affirmed in that

court. Once natural incredulity is overcome, as to the exist-
717 ence of such occurences, there is no difficulty. In the alternative, the petitioners pray, as they did in the Court of Civil Appeals, that the judgment of the Court of Civil Appeals be reformed, if the judgment of the District Court be not affirmed. Practically, the only thing before this court is whether or not a writ of error be granted for the purpose of reforming the judgment of the Court of Civil Appeals and the judgment of the trial court, so as to set aside both judgments and to award to the defendants some recovery. The only conceivable theory of a reformation is to hold that the Court of Civil Appeals went too far in holding that we had no intangibles of value, and that the District Court went too far in holding that we had all the intangibles found by the State Tax Board. Therefore, as will appear upon an inspection of our briefs, and the two opinions of the Court of Civil Appeals, it being impossible to affirm the judgment of the trial court, the only hypothesis will be the granting of a writ of error with the view of determining the existence of some amount of intangibles less than the amount found by the trial court, and awarding the tax collector recovery thereon for some amount less than awarded by the trial court. But this is only a legal hypothesis. There are no intangibles.

But if there is any impression that there are any, we submit that, before a writ of error is granted with a view of their discovery, this court must make a microscopic search of the immense Statement of Facts, for it must be taken together, and we submit that if it does so, it will find no theory of fact to support any intangibles. But this is a matter to be settled by the Court of Civil Appeals. No basis is shown to overthrow the conclusion made by that court. The opinions of the Court of Civil Appeals and our briefs show, we consider, that intangibles do not exist even in microscopic amount, coming even within "de minimis non curat lex."

Whether or not a motion for re-hearing, in the Court of Civil Appeals, and a petition for writ of error limited thereby and founded thereon, can be presented conditionally, as it were, to limit the scope of this court, so as to say here, "I demand an affirmance of
718 the trial court; if that be not granted, I demand a reformation of the trial court, but if that be not granted, then I do not demand a reversal for a new trial, but I limit my relief to the first two demands alternatively made," is a serious question. It is impossible to suppose that this court can do what the Court of Civil Appeals was not asked to do, and was prohibited from doing; and it is unfair to this court and to ourselves to suppose that a writ of error can be granted, so that there can be no correction of the errors of the trial court except to affirm or reduce its judgment. We stop at this point to analyze and apply the statement just made. One presenting a motion for re-hearing can always stand upon the judgment in the trial court in his favor, and also if that judgment has been rendered against him, can say to the Court of Civil Appeals, "In the alternative, reform the judgment of the trial court, or, if the matter is not sufficiently before you to do that, then do not reverse and render the judgment of the trial court against me, but point out

the errors committed in my favor, and reverse the case at the most for a new trial. You should not forever preclude my recovery." But we seriously doubt that one can invoke the jurisdiction of this court and limit its jurisdiction. We are of the opinion that by so attempting, one loses all right to relief here. A says to the Court of Civil Appeals, "I wish no further litigation in the District Court, I insist upon an affirmance of its judgment, or, at most, upon its modification." But how can A, having so said in the Court of Civil Appeals, say to this court, "I insist upon the affirmance of the trial court, or upon the modification of its judgment, but I do not wish this court to in any way reverse and remand the trial court for a new trial," and still maintain an application for writ of error? We do not think that after the inspection of the briefs, opinions and documents in this case any writ would be granted upon the merits; but, supposing that this court might think that there may have been error in the Court of Civil Appeals in reversing and rendering
719 the case, but that the matter was not sufficiently before the Court of Civil Appeals for this court or the Court of Civil Appeals to reverse and reform the case, what then? This court is not asked to and cannot reverse the case for a new trial, first, because it is not asked to do so; and, second, because this court cannot go beyond the relief asked of the Court of Civil Appeals. In limine it is conceivable that, in some case, this court might find error requiring a reversal for another trial, as it often does. If this court should grant a writ, then it would be a wrong to us to permit our opponents to say the trial judgment has to be affirmed, or if not affirmed, must be only modified; and if you cannot modify it, and if you find that there was error committed against the defendant in error in the trial court, then you shall not go into such error. That is the position of our opponents. When they take such a position, can they invoke the jurisdiction of this court? They cannot go beyond that position, because neither in their petition for writ of error, nor in their motion for rehearing before the Court of Civil Appeals, did they go beyond that position. They cannot do here what they did not give the court below a chance to do. They cannot do here what they did not ask that court to do.

If is our contention that we had no intangibles of any value. But no evidence was excluded, everything was upon the table. If there were any intangibles, it was for the Court of Civil Appeals to find them. It could not. We desire to be done with this litigation, but if this court grant a writ of error, it can only grant it not with a view of affirming the trial court (for that is absurd), but with a view of finding that some intangibles exist. We cannot find them. Suppose that this court should find that some intangibles exist. That is the only thing before the court. To so find, this court must say that there was evidence before the Court of Civil Appeals that some intangibles existed. That involves an investigation of the tremendous Statement of Facts, and was settled by the Court of Civil Appeals.
If this court say that there is evidence, it cannot so say with
720 a view of reversing the case for another trial (for our opponents do not so ask, but expressly exclude it), but with

a view of measuring the extent of those intangibles and finding their value, and, so finding, reforming the case against us. If there are, it will be hard for this court to measure the value of such metaphysical abstractions. What will this court then do? It cannot in such a situation reverse the case for a new trial. That is precluded. This court, then, would have to find some lesser measure of intangibles, or if that cannot be done, remand this case to the Court of Civil Appeals, directing that court to find some lesser value of intangibles than the District Judge found. Taking such a course will probably lead this court up against serious difficulties. Starting in the Court of Civil Appeals, one must invoke the jurisdiction of this court without limitations, or not at all. It might easily be that justice to the defendant in error, in granting relief to the plaintiffs in error, would require a reversal in toto.

An inspection of the petition and the motion for rehearing may explain why our opponents have seen fit to attempt to limit the jurisdiction of this court, and why they cut off the power of the Court of Civil Appeals to reverse the case. No evidence having been excluded, the Court of Civil Appeals could have theoretically found the extent of the value of intangibles, if they exist. But the thing is elusive. To suppose the existence of intangibles is contrary to common sense. The bases of action of the trial court were so extraordinary, as shown by the reversal and rendition of its judgment, the gap between the trial court finding that the insolvent I. & G. N. Ry. Company, in the hands of a Receiver, had intangibles of $10,743,223, and that its foreclosed stock of $4,822,000 par was worth $12,934,533, on the one hand, and the Court of Civil Appeals, on the other, holding that the whole thing was a myth and absurdity, and did not exist at all, is so tremendous, that it seems to us that our opponents not unnaturally shrink from attempting another trial, and applying on the
721 trial court the undoubted principles of law laid down by the Court of Civil Appeals. They could find no intangibles; or if they brought in new evidence by any straining hope still the applications of these undoubted legal principles, which this court will never deny, would sweep away their whole basis of recovery, and leave them with no recovery except of some microscopic amount not worth their powder and shot. They were valuing tangibles as intangibles. They cannot do that, and are prohibited from any longer attempting it. So it is, for this or some other reason, they prefer to eliminate any other trial, and to demand here a reformation; for their demand of an affirmance is impossible of serious consideration. On these grounds, without more, we submit that the writ should be refused, and that, if granted, it can only be with a view of this court discovering and weighing and believing the myth of intangibles, or directing the Court of Civil Appeals to find, weigh and value them.

II.

It is insisted that the case should have been dismissed for lack of right parties. How this position can be made consistent with the strenuous and only requests to affirm or to reform we cannot under-

stand. But the point is not worthy of much debate. Without authorities it could be disposed of.

It is contended that this suit cannot be maintained, because it is said that the State Tax Board and the State of Texas are not parties thereto, and that the State Tax Board made this valuation and that the State of Texas is interested in the taxes. This suit only involves taxation of alleged intangibles in Harris county, and while its decision, like the decision of any case, may effect other cases as a precedent, yet it would not in any other sense be res adjudicata for claims for taxes on alleged intangibles in other counties. An effort is made to impress the court with the enormous amount involved. What is immediately involved is something over $6,000, and as to which only this case could be res adjudicata. To say that the State of Texas is not represented in the defendants is remarkable,
722 because the tax collector represents the State of Texas, and collects and sues for the State of Texas, as appears on the pleadings.

Nor can we harmonize this remarkable position with the pleadings. Our opponent ask that all of their claims be disregarded. We sued for an injunction against attempts to make this collection. The tax collector, Druesedow, sued back and brought a cross-action for the taxes. In effect, we are here as a defendant. Druesedow recovered on his cross-action. For the purpose of this case all of our pleading may be regarded as an answer. In effect, Druesedow is the plaintiff. The position of our opponents, if they ever analyzed it, is this: That Druesedow maintain his suit for state and county taxes on alleged intangibles, and that here the defendants in effect be not permitted to put in any defense, because the State Tax Board did not join Druesedow in his suit, and that their suit be dismissed. Our opponents' position makes our minds swing to and fro.

On other grounds the position is untenable. If the intangibles do not exist in whole or to the extent claimed, then no taxes can be collected on them. It is as if one were suing to collect a debt which did not exist; and the other parties preventing the collection of a debt, because it did not exist. The members of the State Tax Board were improper parties, because no relief could be obtained against them. They had made the valuation, apportioned it to the different county assessors, who placed the respective apportionments upon the rolls. Under this statute, as pointed out in our brief, that board was functus officio, having apportioned and certified. It could not be restrained from doing anything; it could not be compelled to do anything. Its control had passed. The point was presented to the Court of Civil Appeals, and is disposed of at the bottom of the first opinion, typewritten, page 23. In many cases people have resisted the payment of such taxes, which had no foundation for their existence when split up, to the different counties, and however claimed.

When a thing does not exist, the part does not exist any more
723 than the whole, and a thing may exist to a certain extent,—a man may have 5 acres of land, and not 1,000. We could cite a great number of cases, but refrain. We refer to the cases cited by the Court of Civil Appeals in its opinion as sufficient.

This court has had the point directly before it. In Railway v. Shannon et al., 100 Texas, 380, suit was against Shannon, Secretary of State, and the other members of the State Tax Board. The point was made that, as Shannon and associates composed a board which was functus, as to what it had done in the past, no suit could be brought against it, and that the suit should be dismissed. This court was of the opinion that that board was not a proper party as to the past, but that the suit attempted to restrain it in the future. If we had succeeded in restraining the State Tax Board from certifying at all, then it would be the proper party. But after it had certified, it is absurd to sue it. No court would order any relief against it, for what it had done, because it is beyond its power under this statute to undo it. When an assessor has valued property and put it on the rolls, it is not necessary nor customary to sue the assessor, under our system, because the property did not exist, at least after the Board of Equalization had approved its valuation. No, the suit is against the tax collector, and with extra precaution, against the Board of County Commissioners along with him, as persons controlling the collection of the tax. No one sues the assessor if he knows what he is about, and the State Tax Board was the assessor. To most of these suits the assessor is not a party. Only nervous lawyers include him as a defendant, and then he is superfl-ous, neither a necessary nor proper party. One might sue the assessor to prohibit him from putting his assessment on the rolls, but after it was there the assessor would be functus.

III.

It is insisted that the Court of Civil Appeals is in error in not reforming this case or affirming it, because the trial judge found that the I. & G. N. Railway owned property in Harris county not assessed as high as other physical property in the county. There was no evidence to sustain him, as we shall point out. 724

But the court was correct in holding that this was purely abstract; that point was never reached. Here the tax collector of Harris County is suing us for taxes on intangibles which are non-existent, and had judgment. We set up that he is suing us for taxes on a thing that does not exist. We have paid all of our taxes on tangibles, exactly as assessed by the county authorities. Suppose that Farmer Plowman owns a farm of 100 acres, and that it is assessed, we will say, for the sake of argument, below the valuation of his neighbors' lands. Whatever it is assessed at, he pays taxes upon it. But suppose, through some error or willfulness, he is assessed as the owner of an entirely different farm, which he does not own. He pays his taxes on the farm which he owns. The money is accepted. Can the tax collector, having accepted his money on what he owned, at the valuation put on it by the public authorities, whirl around and sue him for taxes on the farm which does not exist, as to him, and which he does not own, and insist upon collecting the amount of those taxes because it is said that the farm really owned by him, and upon which he paid taxes, was undervalued? The question

sounds foolish, but this is precisely the position of our opponents. The thing is so unreasonable that it is difficult to discuss it. Our opponents confuse themselves with the cases of M. K. & T. R'y v. Hassell, 123 S. W., 190 (Ct. Civil Appeals, Dallas), and C. R. I. & G. R'y v. Ratcliff, 177 S. W. 571 (Ct. Civil Appeals at Amarillo), and devote much of their breath to contentions that the Galveston Court has flown in the faces of these two cases.

The Hassell case was this: The State Tax Board had valued the intangibles of the M. K. & T. Ry. The railway did not deny the existence of the intangibles at all, but brought a suit claiming that the intangibles had been valued at full value, while the tangible properties in the county were valued for taxation, with the exception of the tangibles of the plaintiff, at not exceeding seventy-five per cent of their market value, and that the county tax authorities had refused to knock off twenty-five per cent of the valuation of intangibles
725 necessary to be done (as alleged) in order to bring about a constitutional equalization. A little analysis shows the difference from ours.

The county collector and the Board of Equalization answered (in the Hassell case) that it was true that property generally had been assessed at seventy-five per cent, but that the tangibles of this railway had been assessed at fifty per cent, and in effect that before the railway could obtain a reduction and equalization on its undisputed intangibles, there must be a raise on its tangibles to a parity with the tangibles of other people, and this position was maintained. If the railway, in the Hassell case, had insisted and proved that it had no intangibles whatever, and had before that paid all of its taxes on tangibles, as was done in our case, at exactly the price fixed by the Tax Board, then we would have the same case. Obviously the principle in the Hassell case is not reached, for how can a tax collector collect taxes on a thing that does not exist, and yet the tax collector of Harris county, Druesedow, sued for taxes on non-existing intangibles, and had judgment therefor. The Ratcliff case (177 S. W. 571), was a like one. It involved, at bottom the same facts, with different figures, as the Hassell case. The railway complained not on the ground that its intangibles did not exist, but admitted their existence at the exact valuation placed thereon by the State Tax Board, and alleged that the property generally in Carson county was valued only at one-third of its value. In the Ratcliff case it was held that taking the admitted intangible values, as to which there was no dispute, and adding them to the tangible values of the railway, valuations were not shown to be out of line with valuations of the property of other persons.

The action of the trial court in finding that the I. & G. N. owned tangibles in Harris county land assessed below an average of fifty per cent of assessment in that county, of land, as found, is therefore irrelevant, as has been found by the Court of Civil Appeals in its opinion, and as appears upon the simple consideration stated above.

726 But such finding, if it were relevant, would be destructive of the affirmance of the trial court, i. e., of the finding that

the I. & G. N. Railway had intangibles to $10,743,223 for the year 1915, unless the trial court had increased the intangibles, which it did not and could not do. As appears on page 6 of our principal brief the State Tax Board found that we had these remarkable intangible values, by stating that we had a true value of $39,116,033, and a physical value of $28,372,810, and that the difference was the intangibles. Consequently, when the District Court raised the amount of the physicals, he should have (on his legal proposition) reduced the amount of the intangibles by deducting a higher physical value. Otherwise, the process of the District Court involved double taxation. There is a discussion in our brief, commencing on page 291, and extending to the end, of the action of the District Court, and also containing a statement of the evidence on this point. It was conclusive, and showed enormous systematic undervaluations and non-valuations as to stocks of goods, cattle, land, intangibles and what not in Harris county. The court, in his conclusions, speaks only of land, but he had no right to ignore these other elements. Even land was valued at much below fifty per cent. Harris county is one of the principal stock counties of the State. Stock was not valued at twenty-five per cent. Intangibles of other corporations were omitted entirely, and many other kinds of property. All of this was done on a systematic plan, not by accident, here and there. The I. & G. N. Ry. owns yards and terminal properties in and around Houston, as every railroad must own. The evidence was undisputed that these were reasonably owned for railroad purposes, and the court found that all of this yard property and track property wherein not actually being used for pure railroad purposes was "reasonably calculated for railroad purposes, and reasonably held therefor." (Part of third conclusion of fact.) A railroad would soon face disaster if it did not endeavor, for yard and terminal purposes, to keep somewhat ahead, in ownership of ground, of that amount actually covered by its tracks. Kelly, introduced by Druesedow, testified as to its value upon the basis of abutting prop-
727 erty and uses for non-railroad purposes, and Parker (called by Druesedow) testified to the reproduction cost of the railroad structures. The judge apparently did not go into the reproduction cost. To Parker's and Kelly's testimony we took careful bills of exception, upon the ground that in a tax suit, as this, as had been clearly decided, no such testimony was admissible, and that the only way of valuing the property was not what abutting property would sell for, but what was this property worth in railroad use and for railroad purposes—the trial judge finding in its conclusion that it was reasonable to hold it for railroad purposes, and that it was reasonably held for such uses. There was no evidence that the valuations of this property—as railroad property, for railroad uses—was out of line with the valuations of other property owners in Harris county, but much the contrary. A railroad cannot sell its property for commercial uses, but must keep it for railroad uses, in order to serve the public, and the judge found this property to be "reasonably calculated for railroad purposes, and reasonably held therefor." That being so, it was only taxable as railroad property. The value of the prop-

erty depends upon what it is worth for railroad purposes. Consequently, such testimony as Kelly's has been denounced as inadmissible, and it has been absolutely ruled that railroad property and real estate cannot be valued for taxing purposes on the basis of the market, or reasonable general value, of abutting property. The only test is, "What does the property yield in railroad experience and use"; what net income and what value will the net income capitalize. (Railroad Co. v. Wright, 151 U. S., 470; 38 L. E., 238, and Railway v. Backus, 154 U. S., 429, 38 L. E., 1037.) We also refer the court to our answer to the motion for re-hearing, and to our principal brief in the Court of Civil Appeals, pages 337, 249-250. The position of our opponents is so extraordinary that it needs no more than a statement thereof to refute it. It is this: "Railroad property must be used for railroad purposes, and you must have property reasonably necessary
728 for your uses, in order to serve the public. You must keep the property for that purpose, and use it in railroad uses or suffer the consequences. The superior authorities determine what your revenue shall be, for the most part, by fixing rates, and thereby fixing what the value is. But if abutting property can be sold for any sort of a purpose, and is not limited to railroad purposes, you will have to pay taxes on the value of abutting property for any purpose, but you shall have income on the value of your property for railroad purposes alone. That is, when you serve the public, you shall be valued at one rate, and a lower rate than that you shall be valued at when you pay taxes to the public." This is tyranny. The Supreme Court of Texas, in 100 Texas, 390 (Ry. v. Shannon) said: "The physical property of a railroad is comparatively of little value, except for the uses for which it is acquired." No matter what witness might be called to put a value on this realty, for non-railroad uses, his testimony would prove nothing. Mr. Kelly, the witness called by our opponents, said that he did not know the value of this property for railroad purposes. and that if called upon to value it for those purposes, he would not be able to value it, but that he was valuing it just at the value of abutting property in his opinion; and that if the railroad was torn up, he would not value the abutting property for values he placed upon it for industrial purposes, nor would he value the abutting property at those values, if, say, it could only be used forever or indefinitely for factory or for some such purpose, and had such restrictions placed upon it. We do not think that we should further discuss this branch of the case.

IV.

Our opponents state that we did not object to the findings of the judge. All of the findings of the judge were carefully excepted to, and correct findings presented to him, all of which he refused to find, and all as shown in our brief, and most elaborately presented. (Our brief, p. 241 to end, and 27-40). It is also contended that we did not
729 present to the State Tax Board any grounds at the public hearing which would give that board light. The board gave us their celebrated formulas. (Our principal brief, page 6).

By elaborate statements of past income, of experience, of legal history, etc., we showed, at the hearing, to the board that there could be no basis for their preliminary finding, to which they adhered. We requested the board to give us the basis of their action. They refused, except to state the formula. They stated that they were not bound to tell us on what basis they acted. This meant that the board had no basis, or, more probably, did not wish us to know, what subsequently developed, to-wit, that they were valuing tangibles under the form of intangibles, in the teeth of the Constitution of the State. Our presentation and argument to the board was taken down and introduced in this trial, and is set out in the Statement of Facts. (Pages [illegible]-74, and principal brief, pp. 53-66). The board was flooded with [illegible]nt, but was determined not to admit that it saw.

If the court has any doubt, in considering the petition for writ [illegible]error, after having read the able opinions of the Court of Civil [illegible]ppeals, we invite their attention to our briefs. There is no difficulty to realize that these bureaucratic gentlemen took the position that we had no day in court, and that if they had bases they were not bound to tell us what they were, and that we were there to go through a form merely, and then submit to action which a set of Prussian bureaucrats would hardly have dared. If the board had bases other than the formula, they realized them in their minds, and could state them. If they did not have such bases in their own minds, then they did not exist. With one exception, it was a pretense, they had no basis, as has been shown by the opinion of the Court of Civil Appeals. Their basis was to value tangibles as intangibles.

The thing is monstrous. As the Court of Civil Appeals has correctly found, there are but two methods by which railroad intangibles can be valued. Either aggregate the market values of all secured indebtedness and all stock, and deduct therefrom the values of the tangibles, or capitalize the average net income over a
730 fair period of years at the rate of interest generally and locally obtained. (See our principal brief, pages 227-246.) Seven per cent. was shown not to be above the rate of interest generally maintaining in Texas. Our opponents have left out the testimony on that point. The Court of Civil Appeals has concluded that seven per cent. is the proper rate to adopt for Texas. The only problem is whether or not it should be a larger per cent. The larger the per cent., the lower, of course, the amount capitalized on the net income. We refer to the testimony of Mr. Dunn, Mr. Sherwood and Mr. Lefevre as to capitalization and what the property would be worth. (Our brief, 79-81, 81-84, 124-132.) The board kept to the brush, and did not come out until counsel having charge of this case for them apparently advised them that they were correct. Then it was plead that they had a right to value tangibles as intangibles, and had done so, a position to which counsel still clings. This is what they were doing behind the formulas, if they were proceeding on anything except the formulas, all as pointed out by the Court of Civil Appeals in their opinions. That the net income basis is the only basis for valuing the public service corporations is supported

in the opinions of the Court of Civil Appeals herein, and by many authorities. It is useless to repeat the discussions in our principal brief. They can be read, commencing on page 227, and extending to (8), page 246. In addition to those given in our discussions, authorities are listed under our proposition in the brief. (Page 150.) We have only made a short selection of cases. This has been long settled in railroad taxation. At bottom there is but one method, that is, the capitalization of net income; for market values of railroad stock and bonds are, at bottom, a mere reflection of net income, excluding the gyrations of the stock market, brought about by speculators, which are no criteria. On the hearing by the board we showed experiences of the road as set forth in the opinion,
731 and on the trial we did this a second time, introducing the same tables and making calculations and proving them, and without dispute, that the Railroad Commission valuations had yielded an income of .04636 over an experience of 14 years. It is unnecessary to discuss the theories of our opponents as to what net income is. We think we know, and that this court knows. Net income is the amount applicable to payment of interest or dividends remaining after the payment of operating expenses and cost of maintenance, and without deducting anything for betterments or capital account. That is net income, which is to be capitalized. This and nothing more (See table, our principel brief, page 71). We ask the court to read our argument in our principal brief, page 171, and extending forward. Our opponents make a contention that three or four per cent. is enough for a Texas railroad to make. Three or four per cent. is bankruptcy to a Texas railroad, and for one reason, because no money lender will lend it money at that rate. The security is too doubtful, and if it sells its bonds at four per cent. or three per cent. or five per cent., it means that it sells them at an enormous discount. See testimony of Messrs. Dunn and Sherwood, our brief, pages 79-84.

Here is a road valued by the Railroad Commission at not over $32,000,000, with a claim for some betterments. At seven per cent., its income experience would not justify a capitalization of twenty millions; at six per cent., it would not justify a capitalization of twenty-five millions. It has stock $4,822,000 worthless and foreclosed, yet the State Tax Board values that stock at $12,934,533, in order to create these mythical intangibles and then, through taxation on them, levy on the tangible property. (Our brief, page 6, and opinions of the Court of Civil Appeals.) If the court desires to go extensively into the methods of the State Tax Board, then let our brief be read. For the good name of the State, we think that those matters should be permitted to drop into oblivion as far as possible; and we trust that they may be kept within the family, as matters which should not be known on the outside.

V.

732 Our opponents are insistent that they have a right to tax tangibles as intangibles, and that the statute creating the State Tax Board and defining their duties, when it uses

the word "intangibles," uses this word as an "arbitrary," and that what the legislature intended was that the State Tax Board should take up in the form of intangibles what might be thought to be the too low valuations for taxation of tangibles by the authorities of the different counties. In the abortive litigation in the Federal Court they presented a sworn pleading, sworn to by the State Tax Commissioner, and signed by the other two members of the State Tax Board, in which they stated this theory, and stated that they had acted upon it, and on the trial appealed from it was acknowledged. Accepting their statement as correct in this particular (and we do not dispute it), and their refusal to so state upon the hearing before them, we are driven to the conclusion that their counsel, who so ardently support this view, advised them that they were right in their theory, and might acknowledge the fact. To this theory counsel have clung with tenacity, and now present it as one of the leading grounds of their petition. The Court of Civil Appeals found it undisputed that this was done. When M. K. & T. R'y v. Shannon was decided (100 Texas, 379), the first act was in force, which provided that the aggregate of valuations made in the counties of tangibles should be deducted from the total valuation, and the remainder should be the intangibles. In the present statute there is no such provision. If it were, and undervaluations were made and proved, then, of course, the statute would be unconstitutional. But the direction now is to deduct the value of the tangibles, for everyone knows that the valuations for taxing purposes of any county are not the true values. No one values his property for taxation at its true value, and he has a constitutional right not to so value it if the assessing authorities are permitting other people to undervalue theirs. In the Shannon case, 100 Texas, 396, evidence was not introduced to show that this undervaluation existed, and the court presumed that it did not exist as a means of upholding
733 the statute (100 Texas, 396.) In this case it was shown, and besides, on the authorities set out in our brief, the courts take judicial knowledge of the existence of these undervaluations when they generally exist.

But our opponents are now tied to their theory that the valuation of tangibles in the guise of intangibles, as they say, is an arbitrary. The Constitution of Texas provides that the tangibles, with the exception of rolling stock, must be valued for taxation by the county authorities.

That matter is fully disclosed in our principal brief. (Pages 156-158; 223-227.) The Court of Civil Appeals concluded, as it was bound to do, that the attempt of the board was unconstitutional, and null and void. Besides, the valuations of tangibles under the guise of intangibles would destroy all parity of valuation of tangibles. (Our brief, pages 262-270.)

VI.

Our opponents rebel at the definition of this court in the Shannon case (100 Texas, 390-391), set out on page 18 of the typewritten

opinion of the Court of Civil Appeals herein as "a clear and accurate definition," to-wit, "The intangible values of a railroad company are the values of the railroad property over and above the value of its physical assets, which intangibles ordinarily result from the profits of its business as actually conducted." Under this definition it is not necessary to show that the railroad was well conducted, but that was shown without contradiction. Rails and ties are physical property, and the whole physical equipment has a different value, by the reason of being enmeshed in the railroad, from what it might have otherwise. This value may be considerably higher or lower than these physicals would have standing alone. Unfortunately, in the case of this railroad, they are decidedly lower, for the value of the road is far below what it cost to aggregate and unite the different physicals entering into it. Our opponents contend that we are forever responsible for what the road cost, and insist, most erroneously, that our auditor has stated its values when he stated its cost. We cannot check up the many errors of statement in
734 the petition. This is only illustrative. Would that the property were worth what it costs! but it is not. Therefore, according to the Supreme Court of Texas and the Court of Civil Appeals, in order that intangibles should exist, we must first place an income upon physicals, and if, after providing for an income upon physicals there is nothing left of the net income, then there are no profits upon which any value can be based for any intangibles, and consequently no intangibles. This is in line with our statute, which provides that first the value of physicals must be deducted from the aggregate value of stocks and secured indebtedness, and that the difference will be intangibles, unless some better method can be used. We have shown that the only other method usable is to get the total value, by capitalizing the average net income, over a fair period of years, and deducting from this the physicals; and that this comes to the same method as that prescribed in the statute, because values of stocks and bonds at bottom depend upon the existence of net income carrying them. We are but little concerned with the wide range of our opponents in the attack on the opinion in the Shannon case, because it is fundamental that the construction of a statute (and this court was dealing with the statute in the Shannon case) by the ultimate court of a State controls, except under extraordinary conditions not here involved, not only the State courts, but the Supreme Court of the United States itself. We decline, therefore, to go into any case with which counsel attempts to contradict the Shannon case. The decision of this court controls (Bailey v. McGuire, 89 U. S., 215, 22 Wall., end of opinion. Lewis v. Munson, 151 U. S., 545, first part of opinion.) Counsel are endeavoring to overthrow the Shannon case and to lead us off into abstractions. His theory seems to be that the value of a tie or any other physical in a railroad, if it has increased in value through being united with the railroad, is an intangible. Of course,
735 that is not the case. We do not care who says so. The value of a tie united to a railroad is a physical value pure and simple. The obligation and whatever goes with it to operate prop-

erty in railroad uses is very often a liability and not an asset. Those old metaphysical theories and hair-splitting refinements have not only been cut off by this court, but are now grown out of date, if they ever had any standing. The existence of intangibles, in the case of railroads, is almost always a myth, and founded on fundamentally wrong theories. There is such a thing as an intangible, but not in the case of an insolvent railroad in the situation of this one. The Court of Civil Appeals is of the opinion that the tangibles of the I. & G. N. Railway are worth (we suppose the court means should be worth) more than the Railroad Commission valuation thereof, as set forth in their last opinion. We think that they should be worth far more, but when the rate-making bodies and governmental control do not permit an income to a railroad which will pay an income upon such Railroad Commission valuation of tangibles, then in the present they are worth no more than that income will capitalize, and the income of the I. & G. N. would not capitalize the Railroad Commission valuation of physicals. Railroads, which are not permitted to make an income upon such metaphysical properties, no longer have such properties; they have simply faded away. The act of Congress approved October 3, 1917, called the War Revenue Act (Section 207, Subsection "*a*," subsection "3" and Subsections "*a*" and "*b*" under said Subsection "3"), declares that the invested capital of a corporation or partnership shall not include any intangibles except actual cash value of patents and copyrights paid for in stocks or shares, not exceeding the par value of the stocks or shares at the time of payment, and that the good will, trademarks, trade brands and franchise and all intangibles of such corporation shall be included in invested capital, if the corporation paid bona fide therefor in cash or tangible property, and if the payment for such metaphysical property was "specifically" therefor provided, that such intangibles should not exceed 20 per cent or one-fifth of the capital stock. The
736 capital stock of the I. & G. N. R'y is worthless, but par is $4,822,000. One-fifth of that would be $964,000. It has been decided by the Supreme Court of the United States that good will in the case of a public service corporation like the I. & G. N., shown to be operating under competitive conditions, is a fiction. (Fargo v. Hart, 193 U. S., 490, 48 L. E., 761.) The purpose of the statute just cited was to define invested capital, so called, because a deduction was allowed for the income on invested capital, before reaching the amount of alleged net income to be taxed under the war tax. The I. & G. N. Railway Company paid nothing when it was organized in 1911, specifically or otherwise, for intangibles or metaphysical properties, and Judge Freeman's attempt, so much dwelt upon, in 1911, to have a larger valuation given for seasoning (which is not an intangible, but a tangible; for the seasoned roadbed remains a tangible), etc., was rejected, and has never been since justified in income. Instead of giving the valuation sought, including any theory of an intangible, the Railroad Commission gave a valuation of about $32,000,000, and refused the valuation of $35,000,000, and the subsequent experience of the road would not

justify this on the income basis. In regard to those matters, our opponents are merely trying to pick the record. We cannot follow them through their misstatements, but in further answer thereto request the court to read our briefs, if any answer be required.

VII.

A ferocious attack is made upon Mr. Holder, Land & Tax Commissioner of the defendant in error, and Mr. Werner, his auditor, and on ourselves for having them testify. This is done in the petition for the writ as well as in the motion for re-hearing. We could go through the form of requesting, out of consideration for those gentlemen, that these unbased assaults upon their characters be struck out as scandalous. But we do not make such a motion. These attacks recoil upon those making them; for these gentlemen so bitterly attacked have won their positions by integrity and many
737 years of hard labor. They are honorable citizens of this State, and we are willing that the attacks made upon them (which cannot dent their well earned characters), shall stand in the files of this court, for a very different purpose than that intended by the person or persons who composed them. Let them remain until they sink into early oblivion, in the mass of forgotten documents, as a representation of what violent bureaucrats will do and of what their conceptions are of rights and characters of men who dare to stand against their tyranny. The I. & G. N. physicals were rendered over the State by Mr. Holder, Land & Tax Commissioner, in the respective counties, not at their true value, but on a general parity, or rather somewhat above a general parity, of valuations placed on other physicals in these counties. He has never stated that they were their true value, and he never swore to them in his affidavits made before the various county assessors in the thirty-seven counties penetrated by this railroad as true values of the properties assessed. It was his constitutional right, and his duty to his employer, to insist upon this parity, and he would have been recreant to his duty and unfit to fill his responsible position if he had not so insisted. It makes not a particle of difference what any statute may say in regard to making oath. He is not bound to make oath and turn in the true values for taxation, when, under a general system, the other people do not do the same. For us to adduce the many decisions upon this point, and to discuss the Constitution thereon, would be a lack of respect to the court. If there are contradictions in the statutes, we cannot help it. Mr. Holder never did, and the record does not show that he ever did, swear to the tax values of the I. & G. N. R'y physicals as their true values. It was his duty to put them in on a parity. This parity we do not think was reached, that is, we are above parity, but it was the duty of Mr. Holder to reach down to it as near as he could. It makes no difference how many statutes would require him to make an untruthful affidavit in this regard.
738 He was not bound to make the affidavit, and never did make it (for such a statute would be unconstitutional), and if there are contradictions in the statute, they are all overthrown by the

specific form of the affidavit prescribed. Different statutes are referred to to support the inference that Mr. Holder had sworn that the values placed in the tax lists, signed by him, were the true values of the property. We care nothing for these if they so provide, because they would be unconstitutional in requiring a man to swear to a lie in order to obtain the constitutional right of parity. We have never seen, as far as we recollect, a tax list footed by a form of affidavit that the values stated were the true values of the property. It is not done, and when the statute comes to state the very form of the oath, there is nothing contained in it as to true values. The form of oath prescribed by the statute is set out in R. S., 7542. In the petition here it is correctly stated that the State Tax Board knew at what values the tangibles had been rendered by Mr. Holder. Of course, they knew, and never were misled in that regard, and they were shown upon the trial. Upon the hearing before the State Tax Board Mr. Holder pointed out, before the board had acted, that in the return to the State Tax Board certain errors had been committed, and explained how they had been committed. (St., 61). Mr. Holder endeavored to correct these errors before the State Tax Board had acted thereon.

Mr. Werner is violently attacked upon the ground, as we understand, that he had stated the tax valuations of tangibles of the I. & G. N. Railway Company at about $28,000,000. Mr. Werner had added in the assessments of tangibles and intangibles of 1914, to get at the assessed values of that year. We are dealing with 1915, but the report required a statement of these matters for the previous year. This could not have deceived the board, and was a pure accident, because the board knew, as is admitted, what were the assessed valuations of the tangibles, and the board had made the assessment of intangibles. If it be said that Mr. Werner put too great or too low a figure as the actual values of the railroad, we reply that
739 his estimates were certainly not so low that a higher estimate would be carried by the experience of net income. But a large part of the attack and accusation of perjury is based upon the contention that there is a contradiction between Mr. Holder and Mr. Werner, and that for this and other reasons they are perjurers. There were certainly no contradictions shown or anywhere hinted at, except as might have grown out of confusion in regard to which Mr. Holder endeavored to put the tax board right in correction of the action of himself and his associates, and before the tax board acted. In the brief, in the Court of Civil Appeals, the attack was made upon Mr. Lefevre in remarkable language. The court, as appears by its opinion, was unmoved, and gave weight to Mr. Lefevre.

So much we state out of obligation to gentlemen with whom we are associated, and whose characters we esteem.

VIII.

The petition for the writ of error is stuffed with misstatements. Only a few of these do we mention. We are unable to understand why this petition was prepared in this way, or why the person or

persons composing it have permitted themselves to fall into such a fury. The blindness of their anger seems to close their eyes, and to lead to the most astonishing confusions of legal propositions and of facts. Much is said about the value of the tangibles and their cost. They undoubtedly cost much more than they are worth now. But what bearing has the value of tangibles as long as there are no intangibles? The gist of the whole matter is this: The State Tax Board have filed a pleading, and stated that they valued tangibles under the guise of intangibles, desiring to re-do the work of the local taxing authorities, and to increase their valuation of our tangibles. It is to be presumed that the county authorities have valued our tangibles on a parity with the property of other persons. The evidence shows that they have valued ours somewhat over this parity.

But this unconstitutional thing (valuing tangibles as in-
740 tangibles) having been done, it is impossible now to justify it, and the whole action of the State Tax Board falls. That is fully discussed in our briefs on file. That action should shock any mind. Even if there was no conscious intention to commit a fraud, we are entitled to relief, all as fully expounded in our briefs. But we cannot think that the members of the board believed that the railway had these intangibles.

We made an abortive attempt in the Federal Court to procure an injunction. Our failure there, in a litigation over a temporary injunction, is not res adjudicata in this suit, as decided by the Court of Civil Appeals. The Court of Civil Appeals, in its opinion (typewritten opinion, p. 23) states that we were entitled to that injunction; but that there is no merit in the contention that the refusal of a preliminary injunction on a preliminary hearing was res adjudicata. That a litigation for a preliminary injunction and its granting or refusal does not constitute res adjudicata has been too often decided to permit a discussion. (Our principal brief, pp. 347-348, and authorities there cited.)

The Court of Civil Appeals held that the statute herein involved was constitutional. We respectfully submit that it was unconstitutional, for the reasons set forth in our brief, and particularly direct attention to those set out on pages 270-290. We consider that it is certain that, in enacting this statute, the legislature intended to provide for double taxation, and that there is no escape therefrom, and that therefore the statute falls, and our opponents' whole case with it; and that, independently of the considerations on which the Court of Civil Appeals decided for us, a writ should be refused.

We respectfully present that no writ should be granted; that there is no ground therefor.

Very respectfully,

WILSON, DABNEY & KING,
Attorneys for Defendants in Error.

Endorsed: In the Supreme Court of Texas. Karl L. Druesdow et
al., plaintiffs in error, vs. James A. Baker, receiver, et al., de-
741 fendants in error. Answer to petition for writ of error of the plaintiffs in error. By Wilson, Dabney & King, attorneys

for defendants in error. Filed in Supreme Court, Nov. 13, 1917. F. T. Connerly, Clk. Against App. No. 10577.

Order Granting Writ of Error.

March 19, 1919.

Application No. 10577.

KARL L. DRUESDOW et al.,

vs.

JAS. A. BAKER, Recr., et al.

From Harris County, 1st Dist.

Order Granting Writ of Error.

This day came on to be heard the application of Karl L. Druesdow et al. for a writ of error to the Court of Civil Appeals for the First District, and the same having been duly considered, it is ordered that the appln. be granted, and the writ of error issue as prayed for upon the filing by applicants of a bond in the sum of $200.00, conditioned to pay all costs of this court, the Court of Civil Appeals, and the District Court, payable to the adverse party, as prescribed by law.

Bond for Writ of Error.

Filed Mch. 26, 1919.

In the 80th Judicial District Court of Harris County, Texas.

#68800.

JAMES A. BAKER and CECIL A. LYON, Receivers of the International & Great Northern Railway Company,

vs.

KARL L. DRUESDOW, Tax Collector, Harris County, Texas, et al.

Bond for Writ of Error.

Whereas in the above styled and numbered cause, on March 28th, 1916, judgment was rendered that the plaintiffs take nothing
742 against the defendants, and that the defendant, Karl L. Druesdow, in his capacity as Tax Collector of Harris County, Texas, recover of and from the plaintiffs the sum of Six Thousand Six Hundred Sixty-seven and 10/100 ($6,667.10) Dollars as state and county taxes due by said plaintiffs to said Harris county, to-

gether with interest thereon at the rate of six per cent from the date of said judgment; and

Whereas, appeal was taken by the plaintiffs from said judgment to the Court of Civil Appeals for the First Supreme Judicial District, at Galveston, Texas, and the judgment in said cause was by the Court of Civil Appeals reversed and said cause was remanded, and

Whereas, application was made to the Supreme Court of the State of Texas in behalf of the defendants in the court below, and appellees in the court of civil appeals, for a writ of error by said supreme court to said court of civil appeals of said first supreme judicial district; and

Whereas, the supreme court on March 19th, 1919, granted said application for writ of error, conditioned that the applicants should within ten days thereafter file bond in the district court, as required by statute, in the sum of Two Hundred and no/100 ($200.00) Dollars, conditioned that they would pay the costs of the supreme court and the court of civil appeals, and the district court, as prescribed by law;

Now, therefore, know all men by these presents: That for the purpose of complying with said order of said supreme court made in said cause, we, Karl L. Druesdow, Tax Collector of Harris County, Texas, W. H. Ward, County Judge of Harris County, Texas, and W. H. Lloyd, J. A. Smith, W. H. Kiser, and D. Barker, in their capacities as County Commissioners of Harris County, Texas, being the defendants in the trial court, and the appellees in the court of civil appeals, and the plaintiffs *of* error in the supreme court, as principals, together with Fidelity and Deposit Co. of Maryland, as surety, do hereby acknowledge ourselves bound and obligated to pay
743 unto James A. Baker and Cecil A. Lyon, Receivers of the International & Great Northern Railway Company, and each or either of them, the sum of Two Hundred and no/100 ($200.00) Dollars, conditioned that we will pay the costs of the supreme court and of the court of civil appeals and of the district court, and prosecute said writ of error with effect and abide by any judgment that may be rendered against us in said cause, and pay off and discharge any judgment that may be rendered against us for court costs thereon.

Witness our hands this the 25th day of March, 1919.

KARL L. DRUESDOW,
Tax Collector, Harris Co., Texas;
W. H. WARD,
County Judge, Harris Co., Texas;
W. H. LLOYD,
County Comr., Harris Co., Texas;
J. A. SMITH,
County Comr., Harris Co., Texas;
W. H. KISER,
County Comr., Harris Co., Texas;
D. BARKER,
County Comr., Harris Co., Texas,

By CAMPBELL, AMERMAN & NICHOLSON,
Their Attorneys,
Principal.
FIDELITY AND DEPOSIT CO. OF MARYLAND,
By JAMES SHELTON,
Attorney in Fact,
Surety.

Approved this 25th day of March, 1919.
O. M. DUCLOS,
Clerk District Court of Harris County, Texas,
By A. J. SCHWEIKART,
Deputy.

THE STATE OF TEXAS,
County of Harris:

I, O. M. Duclos, Clerk of the District Court of Harris County, Texas, hereby certify that the above and foregoing is a true and correct copy of bond this day filed in cause #68800 entitled James A. Baker and Cecil A. Lyon, Receivers of the International & Great Northern Railway Company vs. Karl L. Druesdow, Tax Collector of Harris County, Texas, et al., as appeared from the original
744 on file in my office, the same being filed in accordance with order of the supreme court entered in the matter of application for writ of error in said case.

Given under my hand and seal of office, this the 25th day of March, A. D. 1919.

[SEAL.]

O. M. DUCLOS,
Clerk District Court, Harris Co., Texas.
By A. J. SCHWEIKART,
Deputy.

Endorsed: #10577. Karl L. Druesdow, Tax Collector, et al., vs. Jas. A. Baker et al., Receivers. Certified copy of bond for writ of error. Filed in Supreme Court Mch. 26, 1919. F. T. Connerly, Clk., by H. L. Clamp, Deputy. With No. 3272.

Order of Reference to Commission of Appeals.

May 12, 1920.

May 12, 1920.—Referred to Section A, Commission of Appeals.

Opinion.

Filed Mch. 23, 1921.

The Supreme Court of Texas.

No. 3272.

KARL L. DRUESDOW et al., Plaintiffs in Error,

vs.

JAMES A. BAKER, Receiver, et al., Defendants in Error.

Opinion.

The judgment recommended in the report of the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

NELSON PHILLIPS,
Chief Justice.

March 23, 1921.

745 Commission of Appeals, Section A.

No. 202-3272.

KARL L. DRUESDOW et al., Plaintiffs in Error,

vs.

JAMES A. BAKER, Receiver, et al., Defendants in Error.

(From Harris County, First District.)

This suit was instituted by plaintiffs as receivers of the International & Great Northern Railway Company, hereinafter referred to as Railway Company, against defendants, the Tax Collector, County Judge, and County Commissioners of Harris County, to restrain the collection of taxes assessed against the Railway Company for the year 1915 upon the value of its intangible property, as found by the State Tax Board, and apportioned by the board to Harris county.

In the District Court, plaintiffs were denied relief, and judgment was rendered in favor of Druesdow, Tax Collector, on his cross action for the amount of the tax with interest. On appeal the judgment of

the District Court was reversed, and judgment rendered in favor of plaintiffs, granting an injunction restraining the collection of the taxes. 197 S. W., 1043.

The Act of the Twenty-ninth Legislature, approved April 17, 1905, as amended in 1907, constituting Title 126, Chapter 4, Articles 7407 to 7426, inclusive, Revised Civil Statutes, 1911, and commonly known as the "Intangible Assets Act," created a State Tax Board composed of the Comptroller of Public Accounts, the Secretary of State, and the Tax Commissioner of the State, the latter to be appointed by the Governor.

The Act provides that certain enumerated corporations, including railroad companies, doing business within the state, shall pay, in addition to the ad valorem taxes on tangible properties, an annual tax to the state on their intangible assets and property, and local taxes thereon to the counties in which its business is carried on.

In order to assist the Board in arriving at the intangible values, the corporation coming within the scope of the Act, is re-
746 quired to deliver to the tax commissioner, for the information of the Board, a statement duly verified by affidavit, showing, among other things, the market value of the outstanding stock, or if no market value, the actual value thereof; the assessed value, and also the true value of its tangible property; each and every existing lien, mortgage or other charge upon the whole or any part of its property, and the amount of unpaid debt secured by each such mortgage or lien, including the unpaid interest thereon and the true market value of every such debt; the gross receipts and net income and earning from all sources for the next preceding twelve months, and the amount used for repairs, betterments and extensions. Articles 7415 and 7416, Revised Civil Statutes, 1911.

If upon examination, the board shall deem the statement insufficient, or shall believe further information necessary, it may demand such additional information as it may deem necessary and may hear evidence, to enable it to make a preliminary estimate of the intangible. With the information thus before it, it is required to make a preliminary estimate of the value of intangibles of the corporation, and on or before the 31st day of May, to notify the corporation whose property is sought to be taxed, of such preliminary estimate; and the corporation shall have fifteen days from the time of mailing the notice in which to appear before the board, on a date to be fixed by the notice, to contest the preliminary estimate. Upon, or after the hearing, the board may make changes such changes as it may deem just and proper. Articles 7418 and 7419, Revised Civil Statutes, 1911.

The act then provides:

"In apportioning the value of the aforesaid properties said state tax board shall have the right and it shall be its duty to make use of and consider all evidence which may be put before it and all material facts at its command; and, if it shall believe that some method of calculation other than that specifically prescribed in this chapter is necessary in order to produce just and lawful results, said board

shall follow that method of calculation which it believes best calculated, under all circumstances, to bring about a just, fair, equitable and lawful valuation and apportionment of such property."

747 The board fixed the preliminary valuations of the entire property, and of the intangible property for the year 1915, giving the Railway Company the required notice, and set the hearing for the 18th day of June, 1915.

Prior to the hearing, the tax commissioner, at the request of the Railway Company, exhibited certain formulas by which the calculations, as to values, were made. An error appearing upon the face of the formula prepared for valuations of the Railway Company, was called to the attention of the tax commissioner, whereupon, the figures were amended, and the Railway Company notified of the amended preliminary valuations.

Under the preliminary estimate, the true value of the entire property was fixed at $39,116,033; the physical at $28,372,810; and the intangibles at $10,743,223. From the formula, it appeared that the capital stock issued and outstanding amounted to $4,822,000; the mortgage debt at par $26,181,500.

At the hearing upon the date fixed, the Railway Company introduced evidence which may be summarized as follows: Valuation of tangible, $32,471,027; betterments made since such valuation, the cost of which added to the valuation made a total of $34,013,092.07; net income for 1912, $2,084,149.50; for 1913, $1,155,660.92; and for 1914, $65,405.21; outstanding capital stock and lien indebtedness, the same as that used by the board in its formula.

Upon the conclusion of the hearing, the board adhered to its preliminary valuations and upon a mileage basis apportioned the Harris county, $603,227 of the amount of intangibles so found, which at the rate of taxation applied by Harris county, state and county, amounted to $6,605.34.

Plaintiff contends that the intangible asset act is unconstitutional, being in violation of the Constitution of the State of Texas, and also of Section 1 of the Fourteenth Amendment to the Constitution of the United States; that in fact it had no intangible property; that, if in fact, it had intangibles the same were, by the use of a 748 fundamentally false formula and method which no reasonable mind could in good faith follow, grossly and arbitrarily overvalued, resulting in discrimination against it and in favor of competing roads, and that whatever motive prompted the board, its acts constituted fraud in law.

The decisions of the tax board in the matter of valuations are quasi judicial in their nature. This action is, therefore, a collateral attack upon the judgment of a quasi judicial tribunal. Such an attack can not be justified in the absence of fraud, or something equivalent thereto; lack of jurisdiction; an obvious violation of the law, or the adoption of a fundamentally wrong principle or method, the application of which substantially injures complainant. No mere difference of opinion, as to the reasonableness of its valuation, when such valuations, though deemed erroneous, are the result of honest

judgment, will warrant interference by the courts. Pittsburg C. C. & St. L. R. Co. vs. Backus, 154 U. S. 434; 38 L. Ed. 1039; Western Union Telegraph Co. v. Taggart, 163 U. S. 30; 41 L. Ed. 49.

The formulas, which the Railway Company attacked as fundamentally wrong, were used as the bases for the preliminary estimate or valuation. These formulas were exhibited to the representatives of the Railway Company prior to the hearing and were the subject of discussion at the hearing. The process used by the board in reaching its preliminary valuation is wholly immaterial, the ultimate conclusions or final valuations being the matters under investigation; and unless it be shown that the method used brought about unjust and unlawful results, its judgment will not be disturbed.

The evidence by the tax commissioner is to the effect that the board, in assessing intangibles of all railroads, considered all the evidence and information, and that, disregarding the mathematical calculation, the valuation finally determined represented in each instance the best judgment of which the board was capable under the circumstances; that the board withheld its decision in each instance until the evidence was all in, and if the formula did not re-
749 flect what the board considered a fair and just valuation, the board changed it.

From this and other evidence of the same character, supporting the finding of the trial court, that in making the valuation complained of, the board acted in good faith and that there was no evidence that the board acted arbitrarily or that the valuations were brought about or affected by fraud, bad faith, or other improper motives, but shows that such valuation reflects their best and honest judgment, its judgment should be upheld.

It is urged that if the value of the entire property was as fixed by the board, the physical property was undervalued resulting in a gross overvaluation of the intangibles.

The Railway Company, by the terms of the act, is required to report annually to the tax board both the assessed and actual value of its tangible property. In its statement to the board for the year 1915, it reported the assessed value of its tangibles, including rolling stock, at $16,168,906, and the actual value of all the tangible property (except rolling stock) to be the sum of $26,026,810.78. The actual value of rolling stock does not seem to have been reported, but its assessed value, as shown by the railway company's report, was $2,168,906.

On the hearing before the board, subsequent to the preliminary valuations, as well as upon the trial of this case, a witness for plaintiffs testified to the inaccuracy of the report of the actual value of the tangible property and explained the cause for the mistake, testifying that the actual value of the tangibles was $34,013,092.07. The board in fixing the preliminary valuations, valued the tangibles at $28,372,810, and adhered to this value after the hearing.

In view of the above stated facts, there is warrant for the finding of the board. In reaching this conclusion, it is not necessary to apply the rule invoked by defendants, that the Railway Company is bound by the statement of actual values in its report to the board.

It may be conceded that such report, the result of mistake,
750 is subject to correction upon the hearing before the board. The board is not, however bound to accept as true the evidence adduced to show mistake. It was for the board in fixing the value, to consider the statements of assessed and actual values in the report; the evidence with reference thereto; and, in connection therewith, all other data and information at hand.

A valuation far in excess of the value placed thereon by the Railway Company for assessment purposes in the various counties, equal to the statement of actual value in its sworn report to the board, and in excess of the value of the entire property under the net earnings rule, contended for by plaintiffs, can hardly be deemed an arbitrary and unreasonable undervaluation.

It is insisted that because the Railway, through its inability to meet interest payments has been placed in the hands of receivers pending foreclosure, it has no intangible property. This may be persuasive, but is by no means conclusive evidence of the non-existence of intangible values. Such a question was raised in the Supreme Court of the United States upon a statement of facts somewhat similar to the facts of this case and that court held that a corporation may be subject to the payment of a tax on intangibles, even though the capital stock is sunk and of no value and the company utterly bankrupt. State Railroad Tax Cases, 92 U. S., 575.

In this connection, it may be remarked that an active receivership is a recognition of the existence of intangibles. The receivers herein were appointed, not only or mainly to take into their custody and control, the physical property with a view to its preservation pending foreclosure, but they are charged with the duty of operating the road, and authorized to exercise all the rights and privileges incident and pertaining to operation. They are to keep intact the organization and continue in force traffic and other agreements and trackage rights—in a word, to conserve these and other intangibles which give life, vitality and increased value to tangibles.

751 Plaintiffs contend that the Act is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and various provisions of the Constitution of this State. With but one exception, to be presently discussed, all the objections raised were considered in Missouri, Kansas & Texas Railway Co. of Texas v. Shannon, 100 Texas, 379; 100 S. W., 138, and decided adversely to plaintiffs' contention.

Subsequent to the decision of the Shannon case, the act was amended in several particulars. It is urged by plaintiffs that, as amended, the act requires and authorizes a double taxation of intangibles, and thereby it is rendered unconstitutional.

Section 1 of the Act of 1905 provided that "every individual or association of individuals doing such business shall in addition to the ad valorem taxes on tangible properties which are now imposed upon them by law, annually * * * pay a tax * * * on their unrendered intangible assets and property, and local taxes thereon, to the counties in which its business is * * * carried on."

This section, as amended in 1907, provides that those within the act, "in addition to the ad valorem taxes on intangible properties which are * * * or may be imposed upon them * * * shall pay an annual tax to the state * * * each year on their intangible assets and property and local taxes thereon to the counties in which its business is carried on."

The objection urged is that, under the original act in addition to the tax upon tangibles, a tax was required upon unrendered intangibles. Under the act as amended, the tax required is in addition to the tax imposed upon intangibles, and upon all intangibles, rendered or unrendered, the word "unrendered" before intangibles in the original act, being omitted in the amended act; that intangibles can, under the general law, be rendered in the several counties through which the railroad is operated and though thus rendered and taxed, are again assessed in such counties in accordance
752 with the values fixed by the state tax board, and thereby doubly taxed.

The Court of Civil Appeals held that the word "intangible," where it first appears in the section of the amendment above quoted, was a clerical error, it being the manifest intention of the legislature to there use the word "tangible." We concur in this conclusion.

Prior to the passage of the act, intangibles were required to be rendered and assessed as a part of the tangibles in the several counties. State vs. Austin & N. W. Ry. Co., 94 Texas, 530. Under the act, the valuation and apportionment of the intangible assets are within the exclusive jurisdiction of the state tax board. Such valuations and apportionments are certified by the board to the county assessors, who are required by the act to list the intangibles upon the tax rolls in accordance with the findings of the board. The act does not deal alone with valuations and apportionments, but provides a complete system or scheme of assessment.

Under the original act, the additional tax was to be imposed only upon the "unrendered intangibles." From this an inference may have arisen—very slight however in view of the other provisions of the act—that only intangibles unrendered in the counties were within the act. The omission in the amended act of the word "unrendered" before the word "intangible" destroys even this slight inference and makes clear and certain that the intangibles of a railway company can be assessed only in the manner provided in the act, that is, upon the certified valuations and apportionments of the state tax board. The physicals are taxed under the general law, the intangibles under this act. The act distinctly and unmistakably so provides in the following language:

"All state and county ad valorem taxes upon all intangible property in this state belonging to any individual, company, corporation or association embraced by this chapter, shall be assessed under its provisions and not otherwise; but ad valorem taxes upon all other property of any and all such individuals, companies, corporations and associations shall be assessed as is now or as may hereafter be provided by law."

It is manifest that the act neither requires nor authorizes
753 double taxation of intangibles.

Another contention of plaintiff is, that there was a discrimination against them and a consequent violation of the uniformity and equality clauses of the Constitution with reference to taxation, in this: that there existed a scheme and custom in Harris county, Texas, participated in by defendants to assess other tangibles in the county at not over 38 per cent of their actual value, while the intangible property of the Railroad Company was assessed at its full value, as found by the state board. The answer of defendants was that, as the whole of plaintiff's property, taxable in Harris County, had not been valued for taxation at a greater proportion of its value than the other property in the county, therefore, plaintiff was not entitled to any equitable relief.

It has been definitely decided in this state that where tangibles, including the tangibles of railway companies, in a county are, as a result of a settled practice or custom, systematically assessed below their true value, and the intangibles of the railway companies assessed at their true value, the railway company against which such actual value is assessed is entitled to enjoin the collection of so much of the tax against it as was based upon the assessment of its intangibles at a higher proportionate value than that of other property within the state, upon the ground that such assessment is in violation of Section 1, Article 8 of the State Constitution, requiring equal and uniform taxation, and in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution, guaranteeing equal protection of the law. Lively vs. M. K. & T. Ry. Co. of Texas, 102 Texas, 545.

It is equally well settled that if the intangible assets of a railway company are assessed at their full value and its tangible assets at less than their true value and below the value of the tangible property generally of the county, and such overvaluation of intangible is equalized by the undervaluation of tangibles, as a result
754 of which it is called upon to pay no more than others, it is not entitled to equitable relief because one class of its property is valued above another. M. K. & T. Ry. Co. vs. Hassell et al., 123 S. W., 190. Writ of error denied.

The court found from the evidence that the tangible properties of the Railway Company in Harris county on January 1, 1915, subject to taxation was of the value of $3,205,202.09; that this property was rendered and assessed at the valuation of $1,106,105; that the intangible values apportioned to Harris County were $603,227.44, making the total taxable values $3,809,379, which were assessed at $1,709,332, or about 45 per cent of their values and that the total properties of the Railway Company in Harris County,—tangible, rolling stock and intangibles—were assessed at less than fifty per cent of their value, while other property in the county was assessed at least fifty per cent of its true value.

Under these findings of the court, which are supported by evidence, the Railway Company is not entitled to the relief sought. It can not be heard to say in an equitable proceeding of this sort that the

undervaluation of its tangibles by the Board of Equalization is conclusive and can not be considered in determining whether there has been a discrimination against it, in violation of the uniformity and equality taxation clause of the Constitution.

The Constitution simply guarantees uniformity and equality of taxation. It does not purport to deal with the mode or manner of accomplishing this purpose, but its mandate has been satisfied when uniformity and equality of taxation has been attained. Though the Board of Equalization and state tax board are wholly independent of each other in their respective orbits of operation, their judgments with respect to the violation vel non of the constitutional provision, are interrelated; and where, as in this case, a violation of the provision is based upon the ground that intangibles have, as compared to tangibles generally, been overassessed
755 and the counter charge is made that the tangible of the complainants have, because of reliance upon a sworn statement filed by the complainant with the board assessing tangibles, been under assessed, it is proper to consider the action of both boards in determining the issue. This the trial court did and as a result found that there had been no discrimination against the Railway Company and in favor of the tax payers generally; and this finding we approve.

We recommend, therefore, that the judgment of the Court of Civil Appeals be reversed, and that of the trial court be affirmed.

R. F. SPENCER,
Judge Section A.

Endorsed: No. 202-3272 Commission of Appeals, Section A. Karl L. Druesdow et al., Plaintiffs in error vs. James A. Baker, Receiver et al., Defendants in error. Judgment of C. C. A. reversed and Judgment D. C. affirmed. Opinion. By Spencer, Judge. Filed in Supreme Court Mch. 23, 1921. F. T. CONNERLY, Clk., by H. L. Clamp, Depty.

Judgment.

March 23rd, 1921.

No. 3272.

KARL L. DRUESEDOW et al.

vs.

JAMES A. BAKER, Rec'r, et al.

From Harris County, First District.

Judgment.

This cause having been referred to the Commission of Appeals for their examination and report and said Commission having reported in a written opinion by Hon. R. F. Spencer, Judge of Section

"A," that there was error in the judgment of the Court of Civil Appeals but that there was no error in the judgment of the District Court and recommending that the judgment of the Court of Civil Appeals be reversed and that of the District Court affirmed and said report together with the record in the cause having been duly considered and the judgment as recommended by the Commission of Appeals having been approved by the Court, it is therefore
756 ordered, adjudged and decreed that the judgment of the Court of Civil Appeals be reversed and the judgment of the District Court affirmed. That the plaintiffs in error, Karl L. Druesedow, Tax Collector of Harris county and W. H. Ward, County Judge, and W. H. Lloyd, J. A. Smith, W. H. Kiser and D. Barker, County Commissioners of Harris County, Texas, do have and recover of and from the defendants in error, Jas. A. Baker and Cecil A. Lyon, Receivers of the International & Great Northern Railway Company, and the International & Great Northern Railway Company, the amount adjudged in the District Court; that said defendants in error and their sureties, J. A. Pondran and Chas. Dillingham, pay all costs in this behalf expended in this Court, the Commission of Appeals and Court of Civil Appeals and this decision be certified to the District Court for observance.

Motion for Rehearing.

Filed April 6, 1921.

In the Supreme Court of Texas.

This Court has no jurisdiction to reverse and render the Courts of Civil Appeals in conflict with their conclusions of fact. The State Tax Board cannot constitutionally value tangibles as intangibles, as was plead and admitted to have been done, and found by the Court of Civil Appeals to have been done.

KARL L. DRUESDOW et al., Plaintiffs in Error,

vs.

JAMES A. BAKER, Receiver, et al., Defendants in Error.

Motion by the Defendants in Error for a Rehearing.

757 In the Supreme Court of the State of Texas.

202-3272, Commission of Appeals, Section A.

KARL L. DRUESEDOW et al., Plaintiffs in Error,

vs.

JAS. A. BAKER, Receiver, et al., Defendants in Error.

Motion for Rehearing.

To the Supreme Court of Texas:

Now come the defendants in error, and move for a rehearing herein, and that the judgment and opinion of this Court be set aside, and in support of this motion respectfully represent:

I.

The court erred in reversing and rendering this case, in conflict with the finding of fact of the Court of Civil Appeals herein,—that the State Tax Board had, under the guise of intangibles, valued tangibles; because this finding of fact was not only well supported by the evidence, but undisputed in the evidence; and which action of the State Tax Board was in direct conflict with Article 8 Section 8-11 of the Constitution of the State of Texas; and it not being in the power of the Supreme Court to reverse and render a finding of fact of the Court of Civil Appeals supported by any evidence, and this Court not having the jurisdiction so to do under the Constitution and Statutes; but having the power to reverse the Court of Civil Appeals, and affirm the Trial Court, when the Court of Civil Appeals has made erroneous conclusions of law, on its own or the Trial Court's findings of fact. This Court has no power to set aside the findings of fact of the Court of Civil Appeals, and reverse and render a case, especially when such findings are supported by any evidence, in this instance the findings being supported by all the evidence, and not only so, but admitted by the defendants in their pleadings and testimony.

758 Statement.

The Court of Civil Appeals:

"This arbitrary action of the board was doubtless due to the misconception of the scope of the statute creating the board and of the power conferred upon it by the statute. The pleadings of the defendants and the testimony of the tax commissioner show that the board construed the statute as authorizing it, when it deems the rendition of the physical properties of a railroad for taxation has been made at a valuation less than its fair and just value, to add to this value by an "arbitrary" fixing of intangible values of such railroad. It is clear that the statute has no such meaning, and cannot be construed as conferring any such power upon the state tax board. It has no power to pass upon, correct, or in any way change valuation of tangible property as fixed in the rendition and assessment of such property for taxation. Its right to fix the value of tangible property is only for the purpose stated in the statute of deducting the "true" value of such property from the aggregate value of the stock and mortgage indebtedness and thus determine the value of the intangible property of the road. Any statute which conferred upon the state tax board the power to value and assess tangibles as intangibles and apportion such values among the various counties of the state as provided in this statute would be clearly obnoxious to the provision of the Constitution which requires tangible property to be assessed in the county in which it is situated. Article 8 SS 8-11, 14 State Constitution; Railway Co. v. Shannon, 100 Tex.

379; 100 S. W. 138, 10 L. R. A. (N. S.) 681." (Opinion of the Court of Civil Appeals, Vol. 197 S. W. page 1049, first column).

Pleadings filed in the Federal Court in an abandoned suit, and sworn to by Bagby, and acknowledged by him in the trial of this case to be true, were introduced.

Mr. Bagby was the only member of the State Tax Board who testified in this case.

In these pleadings it was alleged that it was the duty of the Tax Board "to place a valuation upon all of the property of the complainants not otherwise assessed", as appears from the statute, wherein the words "intangible properties", were general and were intended to bring about the valuation by that Board of any deficit or local undervaluation of tangibles in the different counties, "through the complementary action of the State Tax Board and various county officials"; and that it was immaterial how the property was valued, so that tangibles and intangibles together did not exceed the real value (S. F. 329); and that the Board did value and it was their duty to value tangibles and intangibles, so as under the term of intangibles to represent "the additional value
759 to be taxed under a general and undefined term of intangible property"; and that the gross receipt tax had been commuted on this consideration, and that the purpose of the law was "to cause every element of property held by the railroad companies, by whatever name, or whatever character, to be taxed" (S. F. 331-332). That the railroad had made its local rendition of physicals in 38 counties far below their true value, and that if it had not been for the Board "all of this excess of value (that is, excess of value of physicals over renditions thereof) would escape taxation altogether"; and the purpose of the Legislature be evaded, which was that the State Tax Board, under the general terms of intangibles should value all properties so that they all, "of all kinds through the Act of the Board, as supplemental to the assessments in the various counties will be subject to taxation (not) unreasonably in excess of their total real values". (S. F. 333-337.)

And further, that having so met the valuation, it would result that if the intangibles so called were not levied, the railroad would escape a vast amount of taxation on its physicals. That the State Tax Board had taken up, in the term "intangibles" the under taxation on physicals, in order to supplement and correct the action of the various county taxing officials, but that the Board had been careful not to overdo this, and had not, in fact "under the general and arbitrary designation" of "value of intangible properties", added in all of the proportion of physicals under valued by the County Boards, but had added in a portion thereof.

This pleading was sworn to by Mr. Bagby, State Tax Commissioner, and member of the Board (S. F. p. 338).

In the pleadings in this case, this position was again taken in general terms, as set out in the pleadings in the abandoned case in the Federal Court, and stated that the State Tax Board had taken the local valuation of physicals and deducted them from the total value of the property, and reported the remainder under the arbi-

trary term of intangibles, it being the purpose of the law "for
760 the remainder of their properties to be classified as intangibles," and that if there was any error it was the fault of the Receivers in not valuing their tangible properties sufficiently high, whereby tangibles were valued by the Board, under the term intangibles, in order to equalize matters. This Court has judicial knowledge that all property over the State of Texas is undervalued especially farms, live stock, unexempt household equipment, loans and choses in action, and this to an enormous extent on a general system over the State. This is a part of the history of our times of which the Court takes judicial notice (R. R. vs. Board 85 Fed. 309; Trustees vs. Guenther, 19 Fed. 399; Cummings vs. Bank, 101 U. S. 157; Board vs. C. B. & Q. R. R., 44 Ill. 238-9.)

It is a constitutional right of the Receiver to have all property valued on a parity with that of others (Article 8 Sec. 2 Const. of Texas.)

Mr. Bagby, State Tax Commissioner, was called by the State, and testified that he had acted in good faith, and in accordance with his theories of the law, and that he knew of no wrong action by the other members of the Board; that he swore to the answers he filed in the Federal Court.

On cross examination he said that to ask him what he meant by his statement that the Board treated the word "intangibles" in the law as an arbitrary and general catch all, and as not meaning intangibles, he replied, that to require to answer that question "would place him in a very embarrassing position, that to a certain extent he would not say that the word was arbitrary", but that, "that is an arbitrary designation, yes sir, in as far as the I. & G. N. is concerned."

His sworn pleadings being read to him, he said in answer to questions by the Court, and over objections of the State counsel, that he and the Board had applied the law as they understood it, and as stated in their pleadings, so as to cover up the values in the form of intangibles, "yes sir just as stated there (in the pleadings), as far as the intangible assets, yes sir" (S. F. 354-6). He further
761 said that he and the Board, as pleaded by them, understood the object of the intangible tax law was to secure the placing of all property upon the tax rolls, and all elements not otherwise assessed, and that they considered the method of doing this entirely unimportant as long as the aggregate did not exceed the true value of the property; and he was asked: "You understood the law to mean that, didn't you, and acted on that principle? (*a*) "Yes, sir." (S. F. 356-7.)

Further, that he had testified in the Federal Court, and there said, as he said now, that the Board had acted upon all documents before him, but principally upon the formula, and that it was intended by them to make the intangibles a fair representation of the residue of the property, and that he did not report the intangibles as anything more than an arbitrary, under the terms "intangibles including the residue of the property."

Mr. Bagby on this trial said he had made these statements under

oath in the Federal Court; that they were correct to a certain extent, and that he now stated, as he had done in the Federal Court, that the finding of the value of intangibles at $10,743,223, did not represent the intangibles strictly defined", but represented the tangibles taken, arbitrarily to a certain extent (S. F. 357.)

The above is the undisputed testimony; more extensively stated, pages 99-105; 115-117 of statement of facts contained in our brief.

Authorities.

That the State Tax Board has no constitutional or statutory right to value intangibles as it pleaded and admitted it did do under the form of intangibles, and that tangibles can be only valued by the Local Board in the counties where they are.

See Article 8, Sect. 8-11, 14 Const. of Texas; Ry. vs. Shannon 100 Texas, 379; this case, 107 S. W. 1049.

That every tax payer has the right of equality, and that the valuation of his property shall be "equal and uniform", with the same class of property of other tax payers; Article 8, Sect. 2 of the
762 State Constitution. That the Receivers had a right to have the railroad tangibles valued on this parity throughout the counties in which they were, and that this is presumed to have been done by the State Tax Boards; and that it is a matter of judicial knowledge to this Court that physicals are enormously undervalued through the State by the various county boards (Ry. Co. vs. Shannon 100 Texas, 379; Railroads vs. Board, 85 Fed. 309; Trustees vs. Guenther, 19 Fed. 399; Cummings vs. Bank, 101 U. S. 157; Board vs. C. B. & Q. R. R. 44 Ill. 238-9.)

That it is a violation of the First Section of the 14 Amendment to the Constitution of the U. S., and to Sections 8-11 of Article 8 of the Constitution of Texas, and Sections 13-19 of Article 1 thereof, to refuse to give equality when provided by the State Constitution. See the Constitutional references referred to, and Lively vs. Ry., 102 Texas, 559; Galveston County vs. Galveston Gas Co., 72 Texas, 517; Cummings vs. Bank 101 U. S. 153; Baker vs. Druesdow 197 S. W. 1049.

That this court has no power and no jurisdiction to reverse and render a case in contradiction to a finding of fact of the Court of Civil Appeals, especially when supported in the evidence and, as here, when admitted in the opposing pleadings, and all of the evidence, without contradiction, and as has been done by this Board in holding that the intangible valuations, reported by the State Tax Board, of $10,743,223 existed, when it was pleaded and admitted on the part of the State, that all, or a portion of this finding, represented valuation of tangibles. See Sect. 6, Article 5, State Const.

"The decision of said Courts shall be conclusive on all questions of fact brought before them on appeal of error." R. S. 1590.

"Judgments of the Court of Civil Appeals shall be conclusive in all cases on the facts of the case." Guesti et al vs. Galveston Tribune, 105 Tex., 508; Pollock vs. H. & T. C., 103 Texas 772; Bauman vs.

Jaffray & Co., 86 Texas, 618; Tweed vs. Western Union Telg. Co. 107 Tex. 253-254 (Opinion by Justice Phillips.) Other authorities in argument at end of this motion.

763 II.

This Court erred in failing to pass upon the findings of the Court of Civil Appeals, and the legal proposition therein embodied, as set out above, and as appears in Section 5, on page 1049 of the printed report in the S. W. Rep., and the copy thereof filed in this Court. And the Court erred in overruling such undoubted propositions of law and fact, as set out above, and as contained in the opinion of the Court of Civil Appeals, and its findings of fact, the same being fundamental and correct and essential to be passed on, to the decision of this case, and involving fundamental Federal questions.

Statement.

Same as last above.

(NOTE.)—The Court is respectfully requested to pass upon these fundamental propositions. They are bound up with the case, and lie at its foundation. That they are correct will, we presume, occur to the Court upon a superficial inspection. We must presume that the Court has simply overlooked the point. However, should we be mistaken, it is our right to have the points ruled definitely, for whether ruled or not, if this case goes against us, would present fundamental Federal questions which we desire to present in the Supreme Court of the United States, and this Court will aid us by meeting the point, and stating it on the face of the opinion, instead of leaving it as now submerged. That it is our right to have the points passed on, and the duty of the Court to specifically pass upon them, will be, of course, admitted; and if the decision is expressly adverse, we will have it upon the face of the opinion, otherwise, we shall be compelled to dig it up from the opinion and the records, as above.

III.

The Court had no jurisdiction to find, as it did find, and reverse and render, that there was evidence on which the Board rightly found the existence of intangibles in the amount of $10,743,-
764 223.00; because the Court of Civil Appeals having exclusive jurisdiction to so find, found that such intangibles did not exist, and because that Court made this finding on evidence; whether it was contradicted or uncontradicted, is immaterial; whereby this Court had no jurisdiction to reverse and render this case upon a finding in contradiction to that of the Court of Civil Appeals.

Statement.

The Court of Civil Appeals found as follows: That in the hearing before the Board, it was proved that the Board had used certain formulas, and that;

"No evidence was offered in support of the board's action, and no reason given therefor, except the formula, but the plaintiffs proved without controversy the following facts:

"(*a*) The amount of stocks and bonds of the railway outstanding on December 31, 1914, including equipment notes, all taken at par, was $32,154,000, of which $4,822,000 was stock and the railroad commission's valuation was $32,471,027.05, to which might be added additions and betterments not then valued by the railroad commission of book cost of $1,542,065.02.

"(*b*) The railroad paid interest at 6 per cent. on its first mortgage bonds amounting to $11,290,500, and partly out of receivers' certificates, and that the second mortgage had been foreclosed and interest on its bonds was in default.

"(*c*) The tax board was placing a premium of $8,112,533 on the capital stock of par, $4,822,000 although this stock had been foreclosed and was worthless.

"(*d*) The properties had been foreclosed in 1910-11 and sold out and unsecured debts of over $7,000,000, and third mortgage bonds of approximately $3,000,000, and a stock capitalization of $9,755,000 were eliminated and thrown away.

"(*e, f, g*) The net income above operating expenses for 1914 was $65,405, which would capitalize at 7% *per cent* $934,361, and for the calendar year of 1913, $1,153,660.92, which would capitalize at 7 per cent, $16,523,727.43, and for the calendar year of 1912, $2,084,149.40, which would capitalize at 7 per cent, $29,773,564.28. It was shown that no income had ever been paid on the stock of the railroad, except on preferred stock for one year, and that the taxes had increased on the properties from 1904 $127,304.81 to, for 1914, $371,420.22." (Opinion of Court of Civil Appeals found herein, and 197 S. W. 1044.)

The Court of Civil Appeals also found:

"The undisputed evidence adduced upon the trial shows that, upon a hearing by the State Tax Board on June 18, 1915, after notice to plaintiff to appear and show cause why a valuation of the intangible property of the railway company theretofore made by the board should not be made final, the board, after considering plaintiffs' protest and the evidence offered by them, adopted its corrected preliminary valuation, fixing the valuation of said intangibles at the sum of $10,743,223, and apportioned and certified said valuation to the various counties in accordance with the provision of the statute. The amount so apportioned and certified to Harris
765 county was $603,227. The state and county taxes assessed in Harris county on said sum amount to $6,605.34. At said hearing plaintiffs showed that the valuation of the physical properties of the railway company as fixed by the State Railroad Commission some time previous to this hearing was $32,471,027.05, and that since said valuation was made, betterments valued at $1,542,065 had been added to the property, making the aggregate valuation of the tangible property of the railway $34,013,092.07.

"The aggregate of the stocks, bonds and lien obligations of every character of the railway was shown to be $32,154,000. It was further shown that the properties now owned by the railway company, except some additions which have been since made, were sold out under mortgage foreclosure in 1911 in a suit brought by bondholders of the now defunct International & Great Northern Railroad Company and bought in by the present International & Great Northern Railway Company, which was organized for the purpose of purchasing and operating the sold-out company. By this foreclosure the capital stock of $10,000,000 and indebtedness to the amount of $8,000,000 of the old company were wiped out. The present company was placed in the hands of receivers on August 10, 1914, for default on its mortgage indebtedness and decree of foreclosure had been entered on May 17, 1915.

"The properties were shown to have been well managed for the past 14 years, and the net average income during that time was 4.25 per cent on the Railroad Commission's valuation. The average net income for the year 192-, which was shown to be the best year in the history of the properties, was $2,084,149.50, which capitalized at 7 per cent, the average rate of interest in the section through which the railway operates, would show a valuation of $29,743,564.28. The net income for 1913 at 7 per cent would capitalize $16,523,727.43. The net income for the year 1914 at 7 per cent would capitalize $934,361.

"All of the facts above stated were shown in the trial in the court below by the undisputed evidence. At the hearing before mentioned plaintiffs in writing requested the board to give the data or information on which it based its findings of the value of the intangible property of the railroad. In response to this request, it furnished the following formula, which it had used in ascertaining said value:

Gross receipts,	1911	$9,782,165	
" "	1912	11,254,327	
" "	1913	10,902,041	
" "	1914	9,645,785	
Total			$41,584,318
$41,584,318 ÷ 4			10,396,079
Capital stock issued and outstanding		4,822,000	
		26,181,500	
Total capitalization			$31,003,500

$10,396,079 ÷ 31,003,500 = 33.53 ratio.

12.50 ratio T. & P.

33.53 12.50 268.24 ratio.

$4,822,000 x 268.24	$12,934,533	
Mortgage debt at par	26,181,500	
True value		$39,116,033
Physical value (assessed value)		28,372,810
Intangible value		$10,743,233

"The Texas & Pacific Railroad Company ratio used in this formula was obtained by the following formula applied to the earnings, indebtedness, and tangible values of that road:

766 "State Tax Board, Austin, Texas.

Texas & Pacific Railroad Co.

Gross receipts, 1911	$11,079,618	
Gross receipts, 1912	12,341,684	
Gross receipts, 1913	12,381,305	
Gross receipts, 1914	11,745,562	
		$47,548,169
$47,548,169 ÷ 4 =		11,887,042
Stock issued and outstanding	$38,763,810	

Bonded Debt.

First Mortgage (par)	$24,992,975	
First Mortgage "	4,970,000	
Second Mortgage (par)	24,987,036	
	$54,950,011	
Secured interest accrued	1,498,500	
		$56,488,511
Total		56,488,511
Total capitalization		$95,212,321

$11,887,042 ÷ 95,212,321 = 12.48 ratio.

38,763,810 x 12.50 Val. Stk	4,845,476	
Lien obligations	56,448,511	
True value, Texas share, $61,293,987 x 57.60		35,305,336
Physical value		15,588,147
Intangible value		19,717,189

(Opinion and 197 S. W. 1046.)

The Court of Civil Appeals also found:

"It is shown from the whole evidence that the alleged intangible values of the railway company were found by increasing the par value of its capital stock by the application of the formula and reducing the value of its physical properties below the amount fixed

by the state railroad commission, and shown by the undisputed evidence to be their fair value, and from the sum of the mortgage indebtedness and the value of the stock so *so* fixed by the board deducting the decreased value of the physical properties. Unless this process can be held sufficient to show that the railway company has intangible values upon which the assessment can be based, there is no evidence of the existence of said values." (Opinion and 197 S. W. 1047.)

The Court of Civil Appeals also found that the formulæ were absurd, but that as appears above, they were the only basis used by the Board (Opinion and 109 S. W. pages 1047-1048.)

The Court of Civil Appeals also found that there had been no sales of stock and no market quotations. That witnessess had testified that the stock was valueless, and made this conclusion:

767 "Our conclusion of fact, from a consideration of all the evidence, is that the International & Great Northern Railway Company had no intangible property taxable under the laws of this state when the taxes sought to be enjoined were assessed thereon, and the fixing of such values by the state tax board was the arbitrary finding of values that did not exist.

Upon these facts appellants are entitled to protection against the collection of the taxes unless such right is defeated upon grounds urged by appellees, and which will be hereinafter considered." (Opinion and p. 1048, 197 S. W.)

The Court of Civil Appeals also found:

"We have found that the so-called "rule of three" formula, applied by the board to ascertain the value of the stock, cannot be so applied upon any mathematical principle or rational theory, and its general application produces unjust discrimination between railroads. There is no evidence upon which the value of the stock fixed by the board can be sustained, and when called upon and urged by the appellants upon the hearing before it to disclose what, if any, evidence or information it had which tended to disprove the showing made by appellants that no such values existed, the board only offered its "rule of three" formula." (Opinion and 197 S. W. p. 1048, 2 column.)

The Court of Civil Appeals also found, as set out under first assignment above, and that the Board had included, under the term intangibles, values of tangibles. Opinion and 197 S. W. 1049.)

The Court of Civil Appeals also found:

"The board refused to explain its process, or to state the basis of its action, and on what basis of evidence it was acting in making this assessment, and refused to state why, in the formula, they had valued the stock of the insolvent and foreclosed railroad at $12,934,533, its par being $4,822,000, except that the board insisted that the formula was correct." (Opinion and p. 1044, first column 197 S. W.)

These findings are in flat opposition to the findings of this court:

That the evidence by the Tax Commissioner was to the effect that the Board in assessing intangibles, considered all the evidence and information, and that he testified that the Board finally determined upon a valuation to the best of their judgment, and not shown to have been made upon any false or erroneous principles; whereas, it was directly shown, as appears by assignment I above, that it was made in whole, or part, by valuing tangibles as intangibles; and the findings of the Court of Civil Appeals are in direct conflict with the findings of this Court, that there is evidence that the Board acted in good faith, and that there was no evidence that the Board acted arbitrarily, and that the values were brought about or effected
768 by fraud, bad faith, or other improper motives, but "that (the evidence) shows that such valuation reflects their best and honest judgment."

The formulæ set out in the opinion were introduced in evidence (Opinion, & p. 1046, 197 S. W., S. F. 2), and on these formulæ intangibles were found of $10,743,233, which finding was based exclusively on the formulæ, as appears below, and as appears by adherence to the precise arithematical result. These formulæ were a farrago, and an absurdity leading to great inequalities (Testimony of mathematician and engineering expert Lefevre—S. F. 378, etc.), and led to tremendous inequalities as between different railroads, all the formulas applied to different railroads being set out, in addition to those above, (S. F. 3-38 and testimony of Lefevre above, and opinion of Court of Civil Appeals 197 S. W. 1047-48) They were "just a rigmarole of calculations which had no bearing", but which were followed. (S. F. 378-392.) The stock was foreclosed and valueless, but yet to reach the intangibles the Board valued the foreclosed stock, $4,822,000 at a premium of $8,112,533 (S. F. 41). The income and experience was as set out in the opinion and 7% was a reasonable per cent at which to capitalize this income (S. F. 44).

All of these facts, and the experience, as set out in the opinion of the Court of Civil Appeals, were proved without controversy before the Board. (S. F. 44-62.) The Board absolutely refused to state the bases on which they acted, except to state that they took the formulas to go by, "we just took that as a basis Judge, to go by", but after conference the Board absolutely refused to state whether or not they had any other basis, stating that they would not state, that they were present to hear, not to answer. (S. F. 62-70.)

All of these statistics were again proved on the trial, statistics found by the Court of Civil Appeals without any contradiction in evidence, and as stated by the Court of Civil Appeals (S. F. 76-98).

Also, on trial, the income of 14 years was proved, as stated in the opinion (S. F. 98-105).

769 Dunn, a banker and Sherwood, a stock broker of experience in such matters, having the statistics laid before them, testified that the stock was valueless (S. F. 121-136).

The State introduced Mr. Bagby, the only member of the State

Tax Board who testified. (See his testimony in previous statement.) Mr. Bagby stated that in his opinion he had acted in good faith, and on direct examination stated that he took into consideration the formula, but looked independently at the result. That it reflected his best opinion, and he thought that of his associates (S. F. 343).

On cross-examination Mr. Bagby testified that they relied upon the formula, that it was a correct method of the rule of three, and had the support of the Superintendent of Public Education. When asked why they put the stock of the foreclosed corporation at a premium of over $8,000,000, in order to reach the intangibles found, he said: "we followed the figures served"; that the Board had no reason for what they did, except the figures, i. e. the formulas, and the condition of the road as a going concern. That he would not say that the Board had no basis, except the formulas, and the fact that the road was a going concern, but the only other basis was some talk with the ex-Tax Commissioner, and reading on the subject, and the information given by the plaintiffs at the Tax Board hearing. (S. F. 345-350.) "That the State Tax Board was unwilling to accept the Railroad Commission's valuations—we have as much right to figure this way as they have; that the Board paid no attention to the figures of the Railroad Tax Commission." That it did not look to net incomes in cases of some railroads, and did not in the case of the I. & G. N., as far as he could remember. For himself he would not say that he thought the Railroad Commission's values were untrue, but that he figured the values of the I. & G. N. himself by the formulas. That he and the Board refused to deduct the Railroad Commission's valuation. That he considered the relation between the I. & G. N. stock, and gross income to exist, as appears in the formula. That the Board had heard the evidence, and
770 that the stock had never paid a dividend in the history of the Road, except one, and considered that to be true. He was then asked how the Board could have adhered to their preliminary estimate on the formula, and answered:

"(A.) Just like I explained before."
"(Q.) On this formula?
"(A.) Yes, sir, we did on the formula, and stuck to the formula, yes, sir."
(S. F. 351.)

That for the purpose of intangible assets, the stock of the foreclosed corporation was worth $12,934.533, just as shown in the formula, that is, for taxable values. That he thought that if the property was put in the hands of a business concern it would pay. That he did not think it had been well managed, but exploited by the Gould System, and Bush. That he had taken newspaper statements to a certain extent, and did not call upon the Railroad Commission (S. F. 354-5). That he had testified in the Federal Court that the Board had acted principally upon the formula, and that the formula was substantially correct, as showing the intangibles as an arbitrary including tangibles. (S. F. 357.)

As to the I. & G. N. he said "We worked that on the formula."

"(Q.) You just took what the formula brought it out and let it stand, that is right?
"(A.) On the T. & P., yes, sir.
"(Q.) Just like you did on the I. & G. N.?
"(A.) Yes, sir."

"Mr. Myer, for the defendants: You mean by that you——
"Mr. Dabney, for the plaintiffs: I object to the breaking in. He has answered the question."

"(A.) I brought everything I could, just the same way."

"Mr. Myer, for the defendants: You haven't said that, you said you raised it entirely on the formula."
(S. F. 363-4.)

On re-examination by the State, Mr. Bagby testified that the Board applied the formula; if they thought it right let it stand, as in the case of the I. & G. N. Ry., but changed it in the case of some railways, that he had talked to, various railroad's men who complained bitterly about the formula. (R. 365.)

Re-crossed by plaintiff, witness Bagby said—that he had
771 told Holder, the I. & G. N. Tax Commissioner—"that the formula showed the basis of their action in valuing that I. & G. N. Road." (S. F. 365.)

Mr. Lefevre explained the absurdities of the formula, and the mathematical and economical impossibilities, as sufficiently appears above, and also that it had led to enormous inequalities as between the different railways. (S. F. 378-394.)

We also refer the Court to the statement on this subject, contained in our brief in the Court of Civil Appeals (pp. 40-135).

Authorities.

Same as above, and as contained in our argument below.

IV.

The Court erred in refusing to sustain or mention our proposition, that it was fraud in law for the State Tax Board to refuse to explain what bases they had, if any, outside of the formulas, and especially, if this — true when it appears, as is completely shown in this case, and as found by the Court of Civil Appeals, as set out above, that the Board had no basis except the formula, and their concealed intention of valuing tangibles as intangibles.

Statement.

The Court of Civil Appeals found, as appears from the last statement, that the Board refused to explain its process or to state the

basis of its action, and why they had valued the stock of the insolvent and foreclosed railroad at $12,934,533, its par value being $4,822,000, "except that the Board insisted that the formula was correct."

Further Proposition.

It is fraud in law for tax valuing authorities to refuse to state their bases, and a violation of the constitutional rights of the taxpayer.

R. R. etc. Companies vs. Board, 85 Fed. 317.

V.

The Court erred in refusing to find, as found by the Court of Civil Appeals; that Court having final jurisdiction to make
772 such finding, and being amply supported in the evidence, and this Court having no jurisdiction to ignore such finding and render this case; that "No evidence was offered in support of the Board's action, and no reason given therefor, except the formula, but the plaintiffs proved without controversy, the following facts, above set out.

Statement.

The Court of Civil Appeals made this finding. (197 S. W. 1044.) It had evidence upon which to make the finding, as appears in previous statements.

VI.

The Court erred in refusing to find, as the Court of Civil Appeals did find, that the Tax Board had made its valuation upon the formula, and in reversing and rendering this case against the decision of the Court of Civil Appeals, because this Court has no authority so to do, in conflict with the findings of fact of the Court of Civil Appeals.

Statement.

The Court of Civil Appeals found—"that the undisputed evidence adduced upon the trial shows that upon hearing by the State Tax Board on June 18, 1915,—The Board after considering plaintiffs' protest and the evidence offered by them, adopted its corrected preliminary value."—i. e. as expressed by the formula. (Opinion and p. 1046 197 S. W., first column.)

And further, the Court found:

"It is shown upon the whole evidence that the alleged intangible values of the Railway Company were found by increasing value of its capital stock, by the application of the formula, and reducing the value of its physical properties below the amount fixed by the State Railroad Commission, and shown by the undisputed evidence to be

their fair value, and from the sum of the mortgage indebtedness, and the value of the stock so fixed by the Board, deducting the decreased value of the physical properties. Unless this process can be held sufficient to show that the Railway Company had intangible values upon which the assessments can be based, there is no
773 evidence of the existence of said values. (Op. 197 S. W., p. 1047 2 col.)

Further statement as above.

VII.

The Court erred in refusing to follow the Court of Civil Appeals, and in reversing and rendering this case, in collision with the findings of fact of the Court of Civil Appeals, having no jurisdiction to do so, wherein the Court of Civil Appeals found "from a consideration of all the evidence" that this railway had no intangible property taxable under the laws of this State."

Statement.

The Court of Civil Appeals made the findings stated, of fact, as appears in opinion, and 197 S. W. p, 1048, first column.

VIII.

The Court erred in setting aside the findings of the Court of Civil Appeals, and in reversing and rendering this case, in collision with such findings of fact, and without jurisdiction, in refusing to find, as found by that Court—"That the so-called "rule of three" formula applied by the Board to ascertain the value of the stock cannot be so applied upon any mathematical principle or rational theory, and its general application produces unjust discrimination between railroads. There is no evidence upon which the value of the stock fixed by the Board can be sustained, and when called upon and urged by the appellants, upon the hearing before it, to disclose what, if any, evidence or information it had which tended to disprove the showing made by appellants that no such values existed, the Board only offered its Rule of Three formula."

Statement.

The Court of Civil Appeals so found, as appears in the opinion, and 197 S. W., page 1048, second column, section 4.

VIII.

The Court erred in refusing to find, as the Court of Civil Appeals did find, and in reversing and rendering this case in collision with such finding, that the Board had no right to value tangibles under the form of intangibles, as it was proved, plead and admitted
774 by the State had been done; in collision with Article 8,

Section 8-11 of the Constitution of Texas, and the due process of law provision thereof, and with the equality provision thereof and with the first section of the 14 Amendment of the Constitution of the U. S. The Court of Civil Appeals found that the Board had acted, as stated, and valued tangibles as intangibles. (Opinion Sect. 5, page 1049 S. W.) And it was so admitted, plead, conceded and testified to on the part of the Board, as all appears in the first statement herein.

IX.

This Court erred, page 4 of its opinion, in holding that "the evidence by the Tax Commissioner is to the effect that the Board in assessing intangibles of all railroads considered all the evidence and information, and that disregarding the mathematical calculation, the valuation finally determined represented in each instance the best judgment of the Board" (opinion bottom page 4); because this Court had no jurisdiction to reverse and render this case upon the ground that the contrary decision of the Court of Civil Appeals was erroneous, and because the Tax Commissioner directly and absolutely and finally admitted that the finding was based upon the formula, which was a monstrous arithmetical absurdity.

X.

This Court erred, bottom page 5 of opinion,—in holding that "in view of the above stated facts, there is warrant for the finding of the Board"; because, this Court thereby reversed and upon this finding rendered, against the decision of the Court of Civil Appeals, having no jurisdiction to do the same; and because this Court here expressed the idea that the decision of the trial court of an issue of fact if supported in the evidence will, by this court be affirmed, reversing the contrary decision of the finding by the Court of Civil Appeals, also supported by evidence; whereas this Court has no such jurisdiction.

Statement.

Same as above.

775 XI.

This Court erred on page 10 of the opinion in ruling that under the findings of the trial court, and the Court of Civil Appeals, "the Railway Company is not entitled to the relief sought, i. e. to equalize the taxation of the so-called intangibles, if found to exist, with other property in Harris county"; because (*a*) There was no testimony whatsoever, except that of Kelly and Parker as to the value of railroad tangibles in Harris county; Parker testifying to reproduction costs in part; and Kelly testifying on a basis of costs for all uses of abutting property. The only test, as is thoroughly settled, being not on any such bases, but on the value for railroad use, impressed with the public service obligations; (*b*) because, the evidence completely

and without contradiction shows that the tangibles were in every respect fully assessed on or over parity with the tangibles generally over the county, and that there had been a systematic process of doing this, and of omitting blocks of property from taxation, entirely contrary to the equality provision of the Constitution of Texas; (c) because, it was double taxation for the trial court to enormously raise the valuation of physicals in Harris county, without working a corresponding deduction from the State Board's general valuation of intangibles.

Statement.

The trial court stated that it adopted valuations by the Railroad Commission, of tangibles, except that in Harris County it added to the Railroad Commission's valuation, $208,380; $90,000; $100,000, and $75,000 (R. 85). He refused to deduct anything from the intangibles, account of this higher valuation of tangibles, though he was thus thrown in conflict with the State Tax Board, which deducted for physicals, only $28,372,810, the Railroad Commission's valuation being about $32,000. (Brief in Court of Civil Appeals, p. 167).

776 Kelly called, as a real estate expert, testified to the values of railroad tangibles, not for railroad use, but on the basis of every use, and of values of abutting property, over bills of exceptions; and Parker, as Civil Engineer testified, as to portion of reproduction cost, over bills of exception. Objected that this was not the bases. These bills were based upon the proposition stated above. (Bills of Except. R. 137-139. S. F. 300-313; R. 139-140 and R. 141-143).

There was no other evidence as to the values of railroad property in Harris county.

The court found tnat physicals for this County were valued for taxation at 50% (R. 85)

Blake, County Assessor, testified that the Board of Equalization instructed their assessors to get ⅔ valuation; that in his opinion not over 40% in the rural districts was reached; that no attempt was made to tax, loans, moneys, and investments unless the taxpayers chose to have it done. Cattle, sheep and horses were all arbitrarily valued at nominal figures. (S. F. 182-183)

Lidstone of the Assessor's office, and real estate man, testified extensively. There were many other witnesses, the effect of all of whose testimony was that property other than railroad property was valued much under 1/3, and an immense amount of property omitted. This testimony is set out in our brief, pages 298-335.

Authorities.

That for tax purposes property can only be valued upon the basis of value for railroad use when impressed with railroad public service

obligation, and cannot be valued on reproduction cost, or on basis of value of abutting property.

R. R. vs. Wright, 151 U. S. 470;
R. R. vs. Bakus, 154 U. S. 429;
State vs. Ry. 94 Texas 530.

The testimony only went to Harris County. The statements to support this assignment are made above.

777 XII.

This Court erred on page 4 of the opinion, inaccurately and wrongfully stating the fundamental legal propositions, by which it is stated alone tax valuations can be attacked; and this Court erred in not adopting and finding the following correct legal propositions under which, if found, this Court's position cannot be sustained because:

(a) No such valuation can be sustained when made on a wrong volition, it being competely proved in this case that the State Tax Board did, by a wrong volition and deliberately conceal their taxation of tangibles under the guise of intangibles, but it is not necessary to show a wrong volition, where there was discrimination as here.

Authorities.

Lively vs. M. K. & T. Ry. 102 Tex. 559.
Cummings vs. Bank, 11 Otto (S. C. U. S.) 153;
Taylor vs. R. R. 88 Fed. 372.
Johnson vs. Holland, 43 S. W. 71;
R. R. et al. vs. Board, 85 Fed. 311-317.

Wrong volition or concious fraud need not be proved, when as in this case, it is proved and found by the Court of Civil Appeals that the Board acted in finding intangibles so-called, on two bases only, both of which were erroneous, to-wit: the formula, and the concealed purpose to tax, as they did, tangibles as intangibles.

The use of wrong methods condemns the action of the valuing authority.

Johnson vs. Holland, 43 S. W. 71.
C. B. & Q. R. R. vs. Co. 75 Ill. 591.
R. R. et al. Co. vs. Board, 85 Fed. 305.
Taylor vs. R. R. 88 Fed. 374.
Cummings vs. Bank 11 Otto, and 101 U. S. 153.

XIII.

When a valuation is against all the evidence, or is overwhelmingly against it, legal fraud exists, and refusal to act on the evidence is fraud, and this Court has no jurisdiction to set aside the findings of the Court of Civil Appeals to that effect, and to render this case; the

findings of the Court of Civil Appeals being under the Constitution and laws of the State final.

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Authorities.

Board vs. People, 191 Ill. 528; 58 L. R. A. First Ser. 513;
Tainter vs. Lucas, 29 Wis. 375;
Johnson vs. Holland (Tx) 43 S. W. 72.

XIV.

No matter what the volition of the Board is, good or bad, the valuation will be set aside when grossly excessive, and the Court of Civil Appeals having found that the values did not exist, this court has no jurisdiction to reverse the findings of fact, and render against the Court of Civil Appeals.

Board vs. People, 191 Ill., 58 L. R. A. First Ser. 534.

XIV.

The Court erred in not ruling that legal fraud existed, with or without volition to do wrong, when by wrong system applied to different tax payers, gross inequalities resulted as between the different railways, and the Court of Civil Appeals having found that such gross inequalities resulted from the use of the formulas, this Court has no power to reverse and render this case against the findings of the Court of Civil Appeals.

Authorities.

Cummings vs. Bank, 11 Otto 903.
Pelton vs. Bank, 11 Otto (U. S. 143).
People vs. State, 10 Otto 539.

As appears from the statement above, the Court of Civil Appeals found that the use of the formulas produced gross inequalities between the different railways, and this was completely shown by Mr. Lefevre's testimony (see also pages 219-222 brief in the Court of Civil Appeals.)

XV.

This Court erred in refusing to rule and to find the fact found by the Court of Civil Appeals that legal fraud existed by reason of the State Tax Board refusing to state the bases of their action, except that they were using the formula, they having no other basis, as found by the Court of Civil Appeals, except to tax tangibles as intangibles, and this Court has no jurisdiction to reverse this case by reversing such findings.

Authorities.

R. R. vs. Board, 85 Fed. 311.

779 XVI.

This Court erred in refusing to find, as found by the Court of Civil Appeals, upon undisputed evidence and upon admissions and statements of the State's pleading, that the Board did assess tangibles as intangibles, which finding of fact is binding upon this Court, and which it has no jurisdiction to set aside, and by setting the same aside, reverse the Court of Civil Appeals, it being beyond the power of the Board to value tangibles, but the Constitution provides that they should be valued by the County Boards alone.

Authorities.

Article 5, Sections 8 and 11, Constitution of Texas.

XVII.

This Court erred in refusing to find, that railroad property must be valued for taxation as impressed by railroad uses, and either upon the aggregate market value of its stock and bonds, or on the capitalization of its net income, if in action, the first method coming at last to the second, and there being no other way of valuing railroad carriers' property for taxation.

XVIII.

And this Court erred in refusing to find also, as held by the Court of Civil Appeals, and by this Court, in M. K & T. Ry. of T. vs. Shannon, 100 Texas 390-391, to-wit, that intangible values result from "the profits of its (railroad) business as actually conducted."

Authorities.

M. K. & T. Ry. of Texas vs. Shannon, 100 Texas 390-391.
Railroad vs. Board, 85 Fed. 302.

Argument.

We doubt that any argument is necessary, therefore, we shall be brief.

We cannot believe that the Court denies any of the legal propositions made above.

We are forced to the conclusion that the denial of our propositions was not intended by this Court, but that they are denied can-
780 not be contested, upon an inspection of the opinion given by the Court of Civil Appeals in connection with the opinion in this case.

If the opinion as written here stands, then the following erroneous propositions are affirmed:

(1) The Supreme Court has power to set aside findings of fact of the Court of Civil Appeals, though founded on evidence, and to reverse and render against such findings of fact.

(2) The State Tax Board has the power to value for taxation tangibles under the form of intangibles, and the constitutional requirement that tangibles shall be valued for taxation only by the county authorities is set aside.

(3) In determining values of tangibles of a railroad for taxation, it is legal and constitutional to value them not for railroad purposes, but for all other purposes, and to ignore their values as impressed and burdened by the obligation of public service.

(4) A District Judge, on the trial of a tax suit, has the right to increase the valuation of tangibles of a railroad, without deducting the increased valuation over that of the State Tax Board from the aggregate valuation, and thereby, in effect, increasing over the State Tax Board, the valuation of intangibles.

(5) For tax purposes, the valuation of railroad property need not be made either on past experience and the capitalization of the net income on property well managed, nor on the aggregate valuation of stocks and bonds, which merely reflects the capitalization of the net income, but may be made on the declaration of the State Tax Board without any recognizable plan or theory, and without any evidence.

(6) The State Tax Board has the right to refuse to state the bases, if any it has, on which it makes a valuation.

(7) A valuation can be legally upheld or affirmed by the Trial Judge, and disaffirmed by the Court of Civil Appeals as against all evidence, and the Trial Judge will be upheld and the case reversed and rendered, although the Court of Civil Appeals has stated
781 that the valuation is against all evidence.

It seems to us that it is enough to state the above.

This Court, through the Commission of Appeals, has misapprehended the law. Whenever a valuation is against all evidence, or against the overwhelming burden of the evidence, or made on the wrong theory, whether fraudulently or not fraudulently made, or made fraudulently, it cannot stand.

It is plain from the opinion given herein through Judge Spencer, that he became imbued with the idea that this Court had the right and the power to reverse and render the Court of Civil Appeals on its conclusions of fact, and affirm the Trial Judge, if this Court should conclude that there was any evidence to support the Trial Judge, for he says near the bottom of page 5 of the opinion: "In view of the above stated facts, there is warrant for the findings of the Board."

Of course, this is a mere slip-by on the part of Judge Spencer,

and you know that you have no such jurisdiction to so reverse and render this case. You have too often decided that question to permit of any extended discussion thereof. The Constitution and the statutes deprive you of that power. (Section 6, Article 5, State Constitution, R. S. 1590); Guesti et al. vs. Galveston Tribune, 105 Texas, 508; Pollock vs. Ry. 103 Texas, 72; Bauman vs. Jaffrey, 86 Texas 618; Tweed vs. Telegraph Co. 107 Texas 253-4; Lee vs. I. & G. N. Ry. 89 Texas, 589-590; Choate vs. Ry. 91 Texas 410).

This Court has only the power to reverse, or reverse and render upon questions involved, that is, questions of law, if there be no evidence, and if the findings of the Court of Civil Appeals be made without evidence. But, no one will pretend or say that the findings of the Court of Civil Appeals were not supported by evidence. Whatever may or may not be the opinion of this Court as to preponderance, there was abundant evidence before the Court of Civil Appeals, and Judge Spencer in giving this opinion, seems to realize that, for his conclusion only is that there was some evidence to support the findings of the Trial Judge; as a matter of fact there was
782 none whatever. But if there was evidence both ways, to reverse and render this case is beyond the jurisdiction of this Court. This Court has the right, in determining a question of law, to apply legal principles on the findings of fact of the Court of Civil Appeals, in contradiction to the legal opinion of the Court of Civil Appeals, and on such application of legal principles to reverse, or reverse and render the Court of Civil Appeals; but cannot do so by setting aside the findings of fact of the Court of Civil Appeals, even though there be no evidence. This court has no power to collide with a finding of fact as to the existence of a material fact found by the Court of Civil Appeals, and reverse and render the Court of Civil Appeals. It can only reverse, without rendering, it being, of course, a question of law whether any evidence exists.

We do not propose to quote or set out the decisions referred to above. Some of them have been participated in and given, through the Present Chief Justice. We are unwilling to believe, and do not believe that this Court ever intended to seize the jurisdiction which it has exercised in this case, in the teeth of the Constitution and Statutes, and its own express decisions.

On what basis the opinion in this case is written, with reference to an apprehension of the evidence, is a complete mystification to us. There is no basis for valuing a railroad, except on the capitalization of its net income over a fair period of years, or the aggregation of the value of its stocks and bonds; but the last method is really founded upon the first, for a railroad impressed with a public service obligation is only worth for taxation purposes what the experience of its net income will capitalize. We are not now referring to what a railroad should be worth under the constitutional limitations, but what it is worth for taxation purposes.

It is useless for us, upon this point, to thresh over old straw. In the hurry of business, it is apparent that this Court has not grasped the statement of facts contained in our brief, in the Court of Civil

Appeals, nor our arguments therein commencing on page
783 171. We respectfully request the court to peruse the latter.

We know of the congested and manifold duties imposed upon this Court, but in view of the miscarriage of justice, and of what is said in the opinion written by Judge Spencer, there is no other position for us to take, except that the fundamentals of this case have been somehow overlooked. To say that this insolvent railroad was so prosperous as to have, in 1915, $10,743,233 of intangibles, and that its stock of $4,822,000 was at the enormous premium of over $8,000,000 is such a frantic absurdity, and so against all evidence in the case as to make one's mind waive to and fro, for the existence or non-existence of intangibles of a railroad "ordinarily results from profits of its business as actually conducted." (Shannon case above.) The placing on us of these intangibles is the mere infliction upon the railway of a theory of fictitious property, as a basis of taxation. The Railroad Commission has never recognized it, and admitted income thereon, as proved in this case. The national valuation now in progress does not recognize the existence of any intangibles whatever. How can that exist for taxation on which no income ever has been made?

The Court of Civil Appeals has found that the absurd formulæ used by the State Tax Board worked constitutional inequalities against different railroads, and were the bases for the finding of intangibles against this railroad, and that it was an arithmetical absurdity. The silliness of these formulas and the ignorance exhibited thereby is but illustrative of the decline of education, and the ominous incompetency of many public officials and bureaucrats now administering our affairs. There is no use in saying that the State Tax Board did not use these formulas as a bases—they said that they did on their public hearing. The State Tax Commissioner testified that they did, on the trial of this case. They stuck to the results of the formulas to the last dollar, and the State Tax Commissioner expounded them on the trial of this case upon his remarkable
784 theories of the Rule of Three, exhibiting a profound ignorance of elementary arithmetic, not to say of the law and economics. This case is a litigation over the Rule of Three.

In addition, the Court of Civil Appeals found that the State Tax Board founded itself absolutely upon these absurd formulas, using them as a means to value tangibles under the form of intangibles. In our brief and above, we cite a sufficiency of authorities.

In Judge Spencer's opinion, he says that the State Tax Board varied from these findings, if they did not consider them correct. They varied as to a few other railroads, stuck to them as to the I. & G. N. Ry., and swore by it with their last gasp in the Courts. It was a direct fraud, and an arrogant piece of bureaucratic tyranny for them to refuse to state on what bases, if any, they had accepted these formulas, as they did refuse to state upon the public hearing. This has been decided, and we have cited the authorities above, but it needs none.

They stated on that hearing that they were going on the formulas and refused to state whether they had any other bases, or what they

were. On the trial of the case, and in their pleadings, the other bases developed, was, that they had a right to and did value tangibles as intangibles. The valuation of tangibles is committed by the Constitution to County Boards, and as so decided in the Shannon case, they are presumed to value them legally. Of course, it is known to this Court, as a part of the history of the times (see authorities above) that property is enormously undervalued by the State Equalization Boards over the State of Texas, and it is our constitutional right to bring our property down to that parity. Judge Spencer seems to think that we swore to the County valuations,—of course, we did not, nobody ever does, but the affidavit was to the lists of property in the County, there being no affidavit, and none required, to the valuations which, on railroads are always above parity with valuations of farmers and others, as your Honors well know.

785 Mr. Bagby swore to the pleadings, and it was again plead that tangibles had been valued under the form of intangibles. He admitted directly, on testimony, that this had been done. It was admitted in the pleadings in the case, and was directly found by the Court of Civil Appeals (197 S. W. p. 1049, Sec. 5). Not only is this directly against the system provided by the Constitution for the valuation of property, and in violation of a parity, but also it amounts to taxing tangibles in counties where they do not exist, for the State Tax Board has taken them under the form of intangibles and distributed the tangibles in this disguise into counties where they do not exist, squarely against the Constitution of the State. E. G.—Robertson County has more mileage of the I. & G. N. Ry., than any county in the State, but tangibles in the Cities penetrated — this Railway are more valuable. These tangibles being valued under the form of intangibles are distributed on a mileage basis to Robertson and other counties. We press this upon the Court. We are entitled to the admission in pleading, and the direct statements thereof, and the direct admissions in testimony of Mr. Bagby, State Tax Commissioner.

Judge Spencer's opinion ignores this point, one of the principals of our case; it cannot be stated and decided against us. Of course, your Honors accidentally overlooked it. We ask you to rule this very point. Once you write it down, you must necessarily rule it in our favor. It needs only to be stated, it is not a matter for discussion.

Judge Spencer concluded that coming to the parity branch of our case, we were not entitled to relief, because the District Judge found our tangibles in Harris county were valued below parity, and that if added to the distribution of intangibles to Harris County, and the whole reduced to parity, that is 50% as he found, we would not exceed parity.

The Court of Civil Appeals never thoroughly investigated this question. It is presented in our brief in the Court of Civil Ap-

786 peals, under the 28 and 29 assignments, pages 167-169; 39-41 assignments, pages 290-292, and statements thereon, pages 169-170; and 42-43 assignments, pages 336-7, and argument, pages 337-349; and 27 assignment, and statement thereon, pages 165-167.

There was no testimony as to the true value of our tangibles in

Harris county, except that of two witnesses, Parker, Engineer, and Kelly, real estate expert.

Parker testified to the reproduction costs of certain elements. Kelly testified to estimate of values of depot grounds, terminal grounds and rights of way, in Harris County, based upon the valuations he made thereof on the value for all uses of abutting property, all of which was inadmissible, and bills of exception carefully taken. For tax purposes the valuations can only constitutionally be made upon the basis of values for railroad use, impressed with the public service, and none of this testimony was admissible (R. R. vs. Wright, 151 U. S. 470; R. R. vs. Backus, 154 U. S. 429; State vs. Ry. 94 Texas 530).

The Trial Judge raised the valuation of physicals in Harris County over those adopted by the Commissioner's Court, but made no deduction whatever from the intangibles found by the State Board, although he raised the values of tangibles over the gross value of intangibles deducted by the State Board. To this extent, of course, it takes no arithmetic to show that by doing this, he imposed double taxation now affirmed by this court.

We submit this motion with all confidence. Would that we did have the intangibles and the valuable property the State Tax Board imposes upon us, about $10,000,000 more than the State Railroad Commission recognizes.

We most respectfully petition this Court to pass upon the points in this case, and not assume to itself a jurisdiction expressly denied to it by the Constitution of the State, and which we do not believe it ever intended to assume but which it has assumed. It has rendered a judgment herein which it has no jurisdiction to render. The Shannon case was rightly decided, whereby it is declared the existence of intangibles is dependent upon the existence of profits more than sufficient to compensate for the investment in physicals. Where are those profits? It is monstrous for the State to suppose that one agency, the Railroad Commission, and Interstate Commerce Commission, can hold down our revenue, so that our income will not justify any more than a certain capitalization, and on the other hand, that the taxing authorities, as a different arm of the State, can impose upon us property which we did not have, and on which the State does not allow us any revenue. This is necessarily a different question from our right to a revenue. What our right in the future is, is one thing, but we cannot be taxed by the State upon a right or property value which the State itself denies. This has been so often decided, and so fundamentally rests in decency and morality and law, that we will not cite any additional authority to those which we have cited above.

787

We present this application in these plain but respectful terms, because, among other reasons, we do not believe that this Court has intended to affirm what is affirmed in Judge Spencer's opinion.

All, or almost every position we have taken, is founded on a Federal Constitutional limitation, as well as a constitutional limitation embedded in the constitution of Texas. They have been litigated and re-litigated, declared and re-declared by the Supreme Court of the United States, as well as by this Court. They are presented in

our brief upon these bases, and we respectfully request that they be met and ruled upon such bases, and not omitted entirely, as is done to a large extent in Judge Spencer's opinion.

Your Honors will perceive that it is our intention, if, through any mishap, Judge Spencer's opinion is adhered to, to present this case for review, to the Supreme Court of the United States, and
788 therefore, in order to simplify the realization of the points, they should be concretely and definitely stated in the opinion, whichever way they are ruled. E. G. It cannot be disputed, because it is admitted in our opponents' pleadings, and testified to by the Tax Commissioner, that tangibles were values under the guise of intangibles, as has been found by the Court of Civil Appeals, and is not denied or mentioned by Judge Spencer. It cannot be denied. This being done, the Constitution of Texas is violated, and the equality provision of the first Section of the 14 Amend. to the Constitution of the U. S., as has been many times decided. This is made one of the main points of the opinion of the Court of Civil Appeals, and it is our right, we respectfully but persistently present, to have this Court find whether or not this admitted action of the State Tax Board is constitutional. Your Honors now know that it has resulted in a vast inequality, for it has been assumed that, in undervaluing the physicals of the I. & G. N. Ry., the County Boards have not merely reached parity with the physicals of other taxpayers, and exercised a constitutional right to which it is entitled, and which the State Tax Board has endeavored to demolish through the disguise of intangibles.

Judge Spencer takes the position that there was some evidence to support the finding of the Trial Judge and the State Tax Board, that we had these huge intangibles, and unconsciously undertakes, contrary to the Constitution of this State, to overthrow due process of law, and to exercise a jurisdiction which this Court does not have.

The Court of Civil Appeals found that there was no evidence, and that such intangibles did not exist. This is also a Federal question, and involves equality before the law. Many times the Supreme Court of the United States has set aside such decisions as this, as imposing violations, and taking property without due process of law, and in violation of equality before the law, through the
789 guise of false valuations made against all evidence, or the overwhelming preponderance of the evidence, or made in fraud, or on wrong theories, however good the intentions were, so as to work inequally.

It has long been our hope and expectation that the Courts of this State would give us protection in this matter. It is still our hope and belief that this Court only needs to realize the situation to give us our right.

We are aware that a lawyer should not dogmatize but argue his case, but some legal principles and some facts are certain and absolute, and cannot be written down and denied. That is the situation we here confront.

We therefore pray that our motion for rehearing be granted, and

the judgment herein be set aside, and all relief given to us to which we are entitled.

Opposing counsel in this case are the Attorney General of the State of Texas, and Mr. Sewall Myer of Houston, Texas.

Respectfully submitted, DABNEY & KING,
Attorneys for Defendants in Error.

Endorsed: Mo. No. 5101. No. 202/3272. K. L. Druesdow et al., vs. Jas. A. Baker, Rec'r, et al. Mo. for Rehearing. Filed in Supreme Court, Apl. 6, 1921. F. T. Connerly, Clerk. By H. L. Clamp, Deputy. Service Accepted. Overruled.

790 *Order Overruling Motion for Rehearing.*

May 25, 1921.

Mo. No. 5101.

KARL L. DRUESEDOW et al.,

vs.

JAS. A. BAKER, Recr., et al.

Order Overruling Motion for Rehearing.

This day came on to be heard the motion of defendants in error for a rehearing and the same having been duly considered it is ordered that the said motion be overruled as recommended by the Commission of Appeals.

Petition for Writ of Error from the Supreme Court of the United States.

Filed in Supreme Court of Texas August 8, 1921.

JAMES A. BAKER, Receiver of the International and Great Northern Railway Company, et al., Plaintiffs in Error,

vs.

KARL L. DRUESEDOW, Tax Collector of Harris County, Texas, et al., Defendants in Error.

Petition for Writ of Error from the Supreme Court of the United States.

To any Justice of the Supreme Court of the United States, or to the Chief Justice of the Supreme Court of Texas:

Petition for Writ of Error and Allowance Thereof.

Now come James A. Baker, Receiver of the International and Great Northern Railway Company, and that Railway, and J. A.

Pondron, and Mrs. Frances Maria Dillingham, Executrix of the last will of Charles Dillingham, deceased, and Edwin Kirke Dillingham, Executor thereof, petitioners, and respectfully show as
791 follows:

On March 23, 1921, the Supreme Court of Texas; in a cause therein pending, wherein Karl L. Druesedow, Tax Collector of Harris County, Texas, and W. H. Ward, County Judge, and W. H. Lloyd, J. A. Smith, W. H. Kiser, and D. Barker, County Commissioners of Harris County, Texas, were plaintiffs in error, and James A. Baker and Cecil A. Lyon, Receivers of the International and Great Northern Railway Company and their Sureties, J. A. Pondron and Charles Dillingham, were defendants in error; rendered judgment against the said James A. Baker and Cecil A. Lyon, Receivers of the International and Great Northern Railway Company, and said Railway, for the amount adjudged in the District Court, together with all costs in this behalf expended in the Supreme Court, the Commission of Appeals and the Court of Civil Appeals against them and their sureties on appeal, J. A. Pondron and Charles Dillingham; and also adjudged and decreed that the judgment of the Court of Civil Appeals, be reversed and the judgment of the District Court affirmed.

In conformity with the practice of the courts of Texas, after the rendition of the judgment of the Supreme Court of Texas, of date March 23, 1921, the Defendants in Error in the above case (styled in the Supreme Court of Texas, Karl L. Druesdow et al. No. 3272 vs. James A. Baker, Receiver et al., filed a motion for a rehearing in the Supreme Court of Texas, and the same was by that Court overruled by judgment of May 25, 1921.

After the Plaintiffs in the original suit, James A. Baker and Cecil A. Lyon, Receivers of the International and Great Northern Railway Company, had perfected their appeal from the District Court of Harris County, Texas, to the Court of Civil Appeals, in and for the First Judicial District of Texas, Cecil A. Lyon, died, but in accordance with the practice of the Texas Courts, this case has proceeded through the Supreme Court of Texas without notice of the fact of the death of Cecil A. Lyon.

There is attached hereto, a certified copy of a decree of
792 the District Court of the United States for the Southern District of Texas, sitting at Houston, filed July 8, 1916, declaring the death of Cecil A. Lyon and appointing James A. Baker (his co-receiver) sole Receiver of the International and Great Northern Railway Company.

There is also attached hereto, a certified copy of a decree of said Court filed September 25, 1916, declaring that the accounts of Baker and Lyon as Receivers, have been settled and the surety of Lyon as Receiver is discharged. Wherefore, James A. Baker, as Receiver, presents this petition as sole Receiver, coming into the place of the original plaintiffs, who were James A. Baker, and Cecil A. Lyon, Co-Receivers; J. A. Pondran joins herein as a Petitioner. Charles Dillingham died testate after the perfecting of the appeal in this case. In accordance with the practice of the Texas Courts, no notice

has been taken of his death. His will has been probated and certified copies of the Will, decree of probate, and letters to the Executrix and Executor thereof are attached hereto. Wherefore, the Executrix and Executor join herein as petitioners.

The original defendants, in this suit and plaintiffs in error in the Supreme Court of Texas, in whose favor the judgment of that Court has been given, no longer hold the respective offices, except D. Barker, a County Commissioner; but at the election in November 1920, Chester H. Bryan was elected County Judge; A. R. Miller, Tax Collector; and R. H. Spencer, John G. Martin, W. G. Sharman, and D. Barker, County Commissioners; of Harris County, Texas; and that they are now exercising those offices, having duly qualified therein, and there is attached hereto a certificate made by the Secretary of the State of Texas showing that they were elected, have qualified and been commissioned. These persons, in addition to the above named original defendants, are joined as defendants to this application, and are made parties to this suit.

793 The Supreme Court of Texas is the highest court of the State of Texas, in which a decision in this suit could be had, and is the Court having final custody of the record. The judgment of the District Court of Harris County, Texas was against the Plaintiffs and Receivers. The plaintiffs, being receivers, appealed to the Court of Civil Appeals, of the First Supreme Judicial District of Texas, and its judgment was in favor of the plaintiffs and receivers, and the case was reversed and rendered in their favor; whereupon the defendants, and appellees in the Court of Civil Appeals, sued out a writ of error from the Supreme Court of Texas, which reversed and rendered the Court of Civil Appeals and affirmed the District Court, as appears above.

Petitioners were and are aggrieved by the judgment of March 31, 1921, and in the judgment of May 25, 1921, overruling the motion for a re-hearing; and by the proceedings had prior thereto. Certain errors were committed to the prejudice of the petitioners; in that there was drawn in question, the validity of a statute of Texas, as construed, and authority under the State of Texas, on the ground of their repugnance to the Constitution and Laws of the United States, and the decision was in favor of their validity as construed, and in that there was drawn in question the validity of an authority exercised under the United States, and the decision was against its validity; all as will more fully appear, by reference to the Assignment of Errors filed herewith, and to be taken as a part of this petition. All of which rights, titles and privileges under the Constitution and laws of the United States, and as against the validity of the Statute of the State of Texas as construed, and authority exercised under the State were made at the proper time, and were presented and preserved at each and every step of the proceedings herein, as will more fully appear in the record of this cause; and your Petitioners desire to avail themselves of the Law and Practice, in such cases made and provided, by Writ of Error from the Supreme Court of the United States to the Supreme Court of Texas.

794 Wherefore, Petitioners pray that a Writ of Error may be allowed and issued to the Supreme Court of Texas for the removal of this cause into the Supreme Court of the United States, to the end that the errors of the Supreme Court of Texas, reversing the Court of Civil Appeals of the First Judicial District of Texas and affirming the trial court, and that the proceedings in this case may be duly corrected, and full and speedy justice be done to the parties; and that the transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the Supreme Court of the United States, and that a bond be approved to operate as a supersedeas, as provided by law, and that all such other relief as may be due be granted Petitioners.

JAS. A. BAKER,
Receiver of the International and Great Northern Railway Company;
THE INTERNATIONAL & GREAT NORTHERN RY. CO.
J. A. PONDRON,
FRANCES MARIA DILLINGHAM,
Executrix,
EDWIN KIRKE DILLINGHAM,
Executor of the Last Will of Charles Dillingham, Deceased,
By DABNEY AND KING,
Their Attorneys, Solicitors and Counsel.

The foregoing petition for a Writ of Error, with the accompanying assignment of errors, having been presented to me and being considered, and being desirous of giving the Petitioners an opportunity to present in the Supreme Court of the United States, the questions presented by the record, it is ordered and decreed that said Writ of Error is allowed, the same to operate as a supersedeas, on the giving by Petitioners of a bond in the amount of Fifteen Thousand ($15,000.00) Dollars. I have identified the assignment of errors presented with the above petition by my signature. Let it be filed with this Petition.

NELSON PHILLIPS,
Chief Justice of the Supreme Court of Texas.

In Chambers,
This August 6, 1921.

795 (Copy.)

In the District Court of the United States for the Southern District of Texas, Houston Division.

In Equity.

No. 49.

CENTRAL TRUST COMPANY OF NEW YORK, Complainant,

vs.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Defendant.

Order Continuing James A. Baker as Sole Receiver.

The Court having been heretofore advised of the death on April 4, 1916, of Cecil A. Lyon, one of the co-receivers appointed by an order entered herein on August 10, 1914, and deeming it unnecessary and inadvisable, for the present at least, that another receiver be appointed in the place and stead of said Cecil A. Lyon;

It is therefore considered by the court, and so ordered, adjudged and decreed that James A. Baker, the co-receiver of said Cecil A. Lyon, be, and he is hereby continued as sole receiver of all and singular the railways, lands, properties, assets, rights and privileges of the International & Great Northern Railway Company as set forth in the order of this court entered on August 10, 1914, as aforesaid; and that James A. Baker, as such sole receiver, shall hereafter have and exercise all of the rights, powers, duties and authority which were conferred upon him and said Cecil A. Lyon as joint receivers by the order of August 10th, 1914, aforesaid, or by any order supplemental to, or amendatory thereof; that all of the acts and doings of the said James A. Baker as sole receiver since the death of the said Cecil A. Lyon, of every kind whatsoever, shall be deemed to have, and they are hereby given the same force and effect as if this order continuing the said James A. Baker as sole receiver had been made prior to said acts and doings of the said James A. Baker; that the said

796 James A. Baker, Receiver, be and he is hereby, ordered and directed to pass before Thomas H. Ball, Master in Chancery herein, his accounts covering the transactions of himself and his co-receiver, the said Cecil A. Lyon, for the period intervening between the date of the last of such accounts passed by him and the said Cecil A. Lyon, before said Master, and the date of the death of the said Cecil A. Lyon, and that upon the report of the Master approving said account and confirmation of said report by this court, the surety or sureties on the bond given by the said Cecil A. Lyon as receiver shall thereupon be discharged, and released from any further liability thereon.

W. T. BURNS,
United States District Judge.

Indorsements: In the District Court of the United States for the Southern District of Texas, Houston Division. Central Trust Company of New York, Complainant, vs. No. 49. In Equity. International & Great Northern Railway Company, defendant. Order Continuing James A. Baker as Sole Receiver. Filed July 8, 1916. L. C. Masterson, Clerk.

In the District Court of the United States for the Southern District of Texas, at Houston.

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of Order Continuing James A. Baker as Sole Receiver. Filed July 8th, 1916, in cause No. 49 on the Equity Docket of said Court, entitled Central Trust Company of New York, vs. International & Great Northern Railway Company, as the same now appears on file, and of record in Equity Vol. 7, page 472, in my office.

To certify which, witness my hand and seal of said Court,
797 at Houston, in said District, this the 1st day of August, A. D. 1921.

[SEAL.]

L. C. MASTERSON,
Clerk U. S. District Court,
Southern District of Texas,
By M. ANDERSON,
Deputy.

Endorsed: No. 49 Equity. United States District Court Southern District of Texas. Central Trust Company of N. Y. vs. International & Great Northern Ry. Co. Copy of Order Continuing James A. Baker as Sole Receiver. Filed July 8th, 1916.

In the District Court of the United States for the Southern District of Texas, at Houston.

In Equity.

No. 49.

CENTRAL TRUST COMPANY OF NEW YORK, Trustee, Complainant,

—

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, Defendant.

The 25th day of September 1916.

Whereas, on August 10th, 1914, this court appointed Jas. A. Baker, and Cecil A. Lyon, Receivers of the properties and assets of the International & Great Northern Railway Company in the above

entitled and numbered cause; and whereas, the reports of said Receivers of all receipts and disbursements were regularly filed up to and including the 31st day of January, 1916, all of which reports of receipts and disbursements were in due course referred to the Master in Chancery, Thos. H. Ball, and by him duly approved and his reports approving same made to the Court accordingly; and whereas, on the 4th day of April, 1916, Cecil A. Lyon, one of the said Co-receivers, deceased, and this Court thereafter, on, to-wit the 8th day of July, 1916, entered its order continuing and confirming Jas. A. Baker as sole Receiver, providing by said order that all of the acts and doings of the said Jas. A. Baker as sole Receiver since the
798 death of Cecil A. Lyon, of every kind whatsoever shall be deemed to have and same are hereby given the same force and effect as if this order continuing the said Jas. A. Baker as sole Receiver had been made prior to said acts and doings of the said Jas. A. Baker; and whereas, upon the 18th day of July 1916, said Jas. A. Baker, as the surviving Receiver, filed with the Clerk of the Court in the above cause his report of all receipts and disbursements of cash made by A. R. Howard, Treasurer for Jas. A. Baker, and Cecil A. Lyon, Receivers, from February 1st, 1916, to and including April 4th, 1916, which report was duly referred and passed before Thos. H. Ball, Master in Chancery herein; and whereas, the said Thos. H. Ball, Master in Chancery herein, has upon the 16th day of August, 1916, filed his report in this cause approving said account in all respects, which report has been by this Court examined and confirmed, as well as all other reports hereto made by Thos. H. Ball, Master in Chancery, on the reports filed from time to time by Jas. A. Baker and Cecil A. Lyon, Receivers; and whereas, Cecil A. Lyon as Receiver filed in this Court on August 12th, 1914, his bond as Receiver in the sum of $50,000.00, with the Fidelity and Deposit Company of Maryland as surety, which bond was duly accepted and the surety approved; therefore, in view of the premises, it is ordered and decreed by the Court that the Fidelity and Deposit Company of Maryland, as surety upon the bond of Cecil A. Lyon, as Receiver, stand hereby discharged and released from any further liability thereon.

W. T. BURNS,
United States District Judge.

Indorsements: No. 49 in Equity. United States District Court for Southern District of Texas at Houston. Central Trust Company of New York, Trustee, Complainant vs. International & Great Northern Railway Company, Defendant. Int. No. 2650. Order of the Court Approving Accounts filed by Jas. A. Baker and Cecil A. Lyon, Receivers, up to and including April 4th, 1916, and discharging the Fidelity and Deposit Company of Maryland as Surety upon
799 the Bond of Cecil A. Lyon, Receiver. Filed 25th day of September, 1916. L. C. Masterson, Clerk, by J. L. Sexton, Deputy.

In the District Court of the United States for the Southern District of Texas, at Houston.

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of order of the court approving accounts filed by Jas. A. Baker and Cecil A. Lyon, receivers, up to and including April 4th, 1916, and discharging the Fidelity and Deposit company of Maryland as surety upon the bond of Cecil A. Lyon, receiver, filed September 25th, 1916. In Intervention No. 2650, in cause No. 49 on the Equity Docket of said Court, entitled Central Trust Company of New York, vs. International & Great Northern Railway Company, as the same now appears on file, and of record in Equity Vol. 7, page 3535-6, in my office.

To certify which, witness my hand and seal of said Court, at Houston, in said District, this the 1st day of August, A. D. 1921.

L. C. MASTERSON,
Clerk U. S. District Court, Southern District of Texas,
[SEAL.] By M. ANDERSON,
Deputy.

Endorsed: Int. No. 2650. No. 49 Equity. United States District Court Southern District of Texas. Central Trust Company of N. Y., vs. International & Great Northern Ry. Co. Copy of Order of the court approving accounts filed by Jas. A. Baker and Cecil A. Lyon, Recvrs. up to and including April 4, 1916, and discharging the Fidelity and Deposit Company of Maryland as surety upon the bond of Cecil A. Lyon, Receiver. Filed Sept. 25, 1916.

800 *Certificate of Election and Qualification of County and Precinct Officers.*

NOTE.—Fill in and return at the expiration of thirty days from the Election, in compliance with Article 3044, R. S. No commission can issue to any officer until this certificate has been received by the Secretary of State. See Article 3837, R. S. Please also fill in postoffice address where it is possible.

THE STATE OF TEXAS,
County of Harris:

I, Chester H. Bryan, County Judge of said County, do hereby certify that at an election held in said County on the 2nd day of November, A. D. 1920, the following named persons were elected to the respective offices set opposite their respective names, and duly qualified on the date set opposite said names:

Name.	Office.	Date of qualification.	Post-office address.
Chester H. Bryan	County Judge	Dec. 13-1920.	.....
	County Clerk.		
	Clerk for the District Court.		
	County Attorney.		
	County Treasurer.		
	County Surveyor.		
	Sheriff.		
A. R. Miller	Collector of Taxes	Dec. 1-1920.	.....
	Assessor of Taxes.		
	County Supt. Public Instruction.		
	Inspector of Hides and Animals.		
	Justice of the Peace, Precinct No. 1.		
	Justice of the Peace, Precinct No. 2.		
	Justice of the Peace, Precinct No. 3.		
	Justice of the Peace, Precinct No. 4.		
	Justice of the Peace, Precinct No. 5.		
	Justice of the Peace, Precinct No. 6.		
	Justice of the Peace, Precinct No. 7.		
	Justice of the Peace, Precinct No. 8.		

Name.	Office.	Date of qualification.	Post-office address.
	Public Weigher.		
	Constable, Precinct No. 1.		
	Constable, Precinct No. 2.		
	Constable, Precinct No. 3.		
	Constable, Precinct No. 4.		
	Constable, Precinct No. 5.		
	Constable, Precinct No. 6.		
	Constable, Precinct No. 7.		
	Constable, Precinct No. 8.		
R. H. Spencer	County Commissioner, Precinct No. 1	Dec. 13-1920.	.....
John G. Martin	County Commissioner, Precinct No. 2	Dec. 1-1920.	.....
Will G. Sharman	County Commissioner, Precinct No. 3	Dec. 1-1920.	.....
D. Barker	County Commissioner, Precinct No. 4	Dec. 13-1920.	.....

NOTE.—If possible, fill out on typewriter.

801 Witness my hand and seal of the County Court, this 10th day of November, A. D. 1920.

[SEAL.] (Signed) CHESTER H. BRYAN,
County Judge, Harris County, Texas.

This form is prescribed in accordance with provisions of Title 49 R. S., 1911, and all amendments thereto.

C. D. MIMS,
Secretary of State.

Endorsed: —— County. Certificate of Election and Qualification County and Precinct Officers, Election November 2nd, 1920. Filed in Department of State — day of ——, 1920.

The United States of America.

State of Texas.

I, S. L. Staples, Secretary of State of the State of Texas, do hereby certify that the above and foregoing is a true and correct form as prescribed in accordance with provisions of Title 49, Revised Statutes, 1911, and all amendments thereto, pertaining to Certificate of Election and Qualification of County and Precinct Officers, and that the same is in conformity with Article 3044 of the Revised Statutes, which Article 3044 provides that "County Judge shall Certify to Secretary of State the Officers elected and qualified."

And I further Certify the above Certificate of Election and Qualification of County and Precinct Officers is a true and correct copy and form of Certificate of Election and Qualification of County and Precinct Officers as Certified to this Department on November 10th, A. D. 1920, by the County Judge of Harris County, Texas, Chester H. Bryan, and that the six names appearing on said Certificate of Election and Qualification of County and Precinct Officers is a true and correct copy of the names as appears on the Certificate of the

802 County Judge of Harris County, Texas, Chester H. Bryan, as of date November 10th, A. D. 1920, and certified to this Department. And I further certify that the date of Qualification as set opposite each name in said Certificate of Election and Qualification of County and Precinct Officers is the date that each of above named Officers Qualified, and as Certified to this Department by Chester H. Bryan, County Judge of Harris County, Texas.

And I further Certify that the above six named County Officers of Harris County, Texas, have complied with Articles 3837 and 3880 Revised Statutes, 1911. And that Article 3837 provides that a fee of One Dollar shall be charged each and every officer elected or appointed in this State, including State, District, County and Precinct Officers elected or appointed, for issuance of commission of such officer, and that Secretary of State shall not be required to forward copies of laws to nor attest the authority of any officer in this State who fails or refuses to take out his commission as required herein. And that Article 3880 provides that, "Official failing to

take out commission shall not receive fees or compensation, etc." And that Commission has been issued to each of said Officers to the office set opposite of each of their names as contained in the said above attached Certificate of Election and Qualification of County and Precinct Officers, and that the date of issuance of said Commissions was March 4, A. D. 1921, and that copies of said Commissions are not retained in this office.

In testimony whereof I have hereunto signed my name officially and caused the seal of State to be impressed hereon, at the City of Austin, Texas, this the 4th day of August, A. D. 1921.

[SEAL.] S. L. STAPLES,
Secretary of State.

803 No. 7839.

STATE OF TEXAS,
County of Harris:

I, Charles Dillingham, a citizen of Harris county, Texas, being of sound mind and disposing memory, do make this my last will and testament.

First I desire that all my just debts be paid as soon after my death as shall be found convenient by my Executors, hereafter to be named.

2d. I give, devise and bequeath to my beloved wife, Frances Maria Dillingham, all of the property real, personal and mixed of which I may die seized and possessed.

3d. I nominate and appoint my wife the said Frances M. Dillingham and my son Edwin Kirke Dillingham to be the Executors of this my last will and testament, and it is my will and I so direct that no bond or other security shall be required of them as said executors.

4th. It is my will and I so direct that no action shall be had in the County Court or other court of probate further than to probate this will and record an inventory and apprais-ment of my Estate, and a list of claims as provided by law.

Witness my hand this 22d day of February, 1910.

CHAS. DILLINGHAM.

April 19th, 1912.

I give, devise and bequeath twenty-five thousand dollars to my daughter Mary Pauline Dillingham for her sole use.

CHAS. DILLINGHAM.

Filed Jul. 10, 1917.
GEO. JONES,
Clerk County Court, Harris Co., Texas,
By W. B. ARCHER,
Deputy.

Recorded Vol. 45, page 210.

804 In the County Court of Harris County, Texas.

In the Estate of CHARLES DILLINGHAM, Deceased.

On this the 27th day of October, A. D. 1917, came on to be heard the application of Frances M. Dillingham, a feme sole, and Edwin K. Dillingham, for the probate of the last will and testament of Charles Dillingham and codicil attached thereto, and the Court having heard in open court the evidence in support of said will and being fully advised in the premises finds

(*a*) That Charles Dillingham is dead; that he died in the City of Watkins, State of New York, where he was temporarily sojourning, on the 19th day of June, A. D. 1917.

(*b*) That the permanent residence and fixed domicile of Charles Dillingham at the time of his death was in Houston, Harris county, Texas, where the principal part of his estate is situated.

(*c*) That Charles Dillingham left a last will and testament, executed on the 22nd day of February, 1910, and a codicil attached thereto, executed on April 19th, 1912, and that said will and testament and codicil and signatures thereto are wholly in the handwriting of said Charles Dillingham, deceased, and that the testator was at the time of the execution of said will and at the time of the execution of said codicil more than twenty-one years of age; that he was of sound mind and disposing memory; that said will and codicil were executed with all the formalities and solemnities and under the circumstances required to make them a valid will and codicil and that the same have never been revoked.

(*d*) That this court has jurisdiction of the estate of Charles Dillingham, deceased, and of this proceeding, as Charles Dillingham was a resident of Houston, Harris county, Texas, and the principal part of his estate is situated in Houston, Harris County, Texas; that citation giving notice of the intention to probate said will and codicil has been given in the manner and for the length of time as required by law.

805 It is therefore considered by the Court and so ordered, adjudged and decreed that the instrument purporting to be the last will and testament of Charles Dillingham, bearing date of February 22, 1910, and the codicil attached thereto bearing date of April 19th, 1912, and now offered for probate by his wife, Frances M. Dillingham and his son, Edwin K. Dillingham, be and the same are now declared to be the last will and testament of Charles Dillingham, deceased, and said will and codicil are now admitted to probate as his last will and testament, and the Clerk of this Court is directed to record said will and codicil, with the application for their probate and the testimony in support thereof, upon the minutes of the Court.

It is further ordered by the Court that S. M. McAshan, W. C. Hunt and N. L. Mills of Harris County, Texas, be and they are

hereby appointed appraisers of said estate, and are directed to return an inventory and appraisement of the estate in the manner and within the time required by law.

And it further appearing to the Court, from the recitations of said last will and testament that Frances M. Dillingham, wife of the decedent, and Edwin K. Dillingham, his son, are named executrix and executor of said estate without bond, and that the said will provides that no action be taken, by this court, in the administration of said estate, except to probate the will and return an inventory and appraisement of said estate.

It is therefore further considered, ordered, adjudged and decreed by the Court that the said Frances M. Dillingham and Edwin K. Dillingham be and they are hereby appointed independent executrix and independent executor, respectively, of the estate of Charles Dillingham, deceased, without bond, and they are authorized and directed to administer said estate independently of the orders of this Court, and the Clerk of this Court is directed to issue to them respectively, letters testamentary upon their taking the oath of
806 executrix and executor, as required by law.

It is further ordered and decreed by the Court that the last will and testament, dated February 22, 1910, and codicil, dated April 19, 1912, of Charles Dillingham, deceased, and now admitted to probate, are in words and figures as follows:

STATE OF TEXAS,
County of Harris:

I, Charles Dillingham, a citizen of Harris County, Texas, being of sound mind, and disposing memory, do make this my last will and testament. First I desire that all my just debts be paid as soon after my death as shall be found convenient by my executors, hereafter to be named.

2nd. I give devise and bequeath to my beloved wife, Frances Maria Dillingham all of the property real, personal, and mixed of which I may die seized and possessed.

3rd. I nominate and appoint my wife the said Frances M. Dillingham and my son Edwin Kirke Dillingham to be the executors of this my last will and testament, and it is my will and I so direct that no bond or other security shall be required of them as said executors.

4th. It is my will and I so direct that no action shall be had in the County Court or other Court of probate further than to probate this will and record an inventory and appraisement of my estate, and a list of claims as provided by law.

Witness my hand this 22nd day of February, 1910.

(Signed) CHAS. DILLINGHAM.

April 19th, 1912.

I give devise and bequeath twenty-five thousand dollars to my daughter Mary Pauline Dillingham for her sole use.

(Signed) CHAS. DILLINGHAM.

It is further ordered by the Court that upon the return of the inventory, appraisement and list of claims of this estate and approval thereof by the Court, and upon payment of all costs of court,
807 this estate be closed and dropped from the docket.

CHESTER H. BRYAN,
Judge.

Recorded Vol. 45, page 210.

STATE OF TEXAS,
County of Harris:

I, Albert Townsend, Clerk of the County Court in and for the State and County aforesaid, do hereby certify that the above and foregoing is a true and correct copy of Will and Order in the matter of the estate of Chas. Dillingham, deceased, as the same appear from the originals on file in my office, bearing file No. 7839.

Given under my hand and seal of said Court, at my office in Houston, Texas, this 3rd day of August, A. D. 1921.

[SEAL.] ALBERT TOWNSEND,
Clerk County Court, Harris County, Texas.
By D. E. LUSHER,
Deputy.

Endorsed: No. 7839. Certified Copy will & Order in the Matter of the Estate of Chas. Dillingham, Dec'd.

In the County Court.

THE STATE OF TEXAS,
County of Harris:

I, Albert Townsend, Clerk of the County Court of Harris County, Texas, do hereby certify that on the 27 day of October, 1917, Frances M. Dillingham and Edwin K. Dillingham *was* duly appointed by said court Executrix and Executor without bond of the last will of Chas. Dillingham, deceased, and that they qualified as such on the 9 day of Nov. 1917, as the law requires.

Witness my hand and seal of office, at Houston, Texas, this 3rd day of August, 1921.

[SEAL.] ALBERT TOWNSEND,
Clerk County Court, Harris County, Texas.
By D. E. LUSHER,
Deputy.

808 Endorsed: No. 7889. Estate of Chas. Dillingham, Deceased. Letters Testamentary.

Endorsed: James A. Baker, Receiver of the International and Great Northern Railway Company, et al., Plaintiffs in Error, vs. Karl L. Druesedow, Tax Collector of Harris County, Texas, et al., Defendants in Error. Petition of Writ of Error from the Supreme Court of the United States. Filed in Supreme Court of Texas, August 8, 1921. F. T. Connerly, Clerk.

Bond for Writ of Error.

Bond for Writ of Error.

Filed August 8, 1921.

In the Supreme Court of the United States.

JAMES A. BAKER, Receiver of the International & Great Northern Railway Company et al., Plaintiffs in Error,

vs.

KARL L. DRUESDOW, Tax Collector of Harris County, Texas, et al., Defendants in Error.

Bond on Writ of Error.

Know all men by these presents: That we, James A. Baker, Receiver of the International & Great Northern Railway Company and said Railway Company and J. A. Pondron and Frances Maria Dillingham, Executrix and Edwin Kirke Dillingham, Executor, of the last will of Charles Dillingham, deceased, as principals, and United States Fidelity & Guaranty Co. as surety, are held and firmly bound unto Karl L. Druesedow, Tax Collector of Harris county, Texas, W. H. Ward, County Judge, W. H. Lloyd, J. A. Smith, W. H. Kiser, and D. Barker, County Commissioners of Harris County, Texas; and also to their successors in office, A. R. Miller, present Tax Collector of Harris County, Texas, and Chester H. Bryan, present County Judge of Harris County, Texas, and R. H.
809 Spencer, John G. Martin, W. G. Sharman, and D. Barker, present County Commissioners of Harris County, Texas; D. Barker having been re-elected and is the same person as the D. Barker above mentioned; in the full and just sum of $15,000.00 to be paid to these persons, to whom we acknowledge ourselves bound, and to their successors, to which payment well and truly be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Whereas, in the above entitled cause, entitled in the Supreme Court of Texas, Karl L. Druesedow et al. vs. James A. Baker, Receiver et al., No. 3272, the Supreme Court of Texas rendered its judgment on the 23rd of March, 1921, reversing the judgment of the Court of Civil Appeals of the First Supreme Judicial District of Texas, and affirming the judgment of the District Court of Harris County, Texas, in favor of the said Karl L. Druesedow, Tax Col-

lector of Harris County, Texas, and W. H. Ward, County Judge, and W. H. Lloyd, J. A. Smith, W. H. Kiser and D. Barker, County Commissioners of Harris County, Texas, against James A. Baker and Cecil A. Lyon, Receivers of the International & Great Northern Railway Company; and said Railway and against J. A. Pondron and Charles Dillingham, their sureties, affirming against them the amount adjudged by the District Court, together with all costs, as in the judgment set out; .

And whereas, on May 25, 1921 the Supreme Court of Texas overruled a motion for re-hearing, presented by James A. Baker, Receiver, et al.; and whereas the said Cecil A. Lyon deceased pending the litigation, and James A. Baker is now sole Receiver, and Charles Dillingham deceased pending litigation, and the above mentioned persons are the executrix and executor of his Will, and there have been changes in the County Offices of Harris County, Texas, pending litigation, all as stated above;

And whereas, the principals hereof have obtained a writ
810 of error and filed a copy thereof herewith in the Clerk's office of the Supreme Court of Texas, to reverse the judgment in the aforesaid suit, and a citation directed to the aforesaid payees of this bond, citing and admonishing them to be and appear at the Supreme Court of the United States in Washington, District of Columbia, and a session thereof within 30 days from the date thereof;

Now the condition of this obligation is such, that if James A. Baker, Receiver of the International & Great Northern Railway Company and the other principals hereof shall prosecute said writ of error to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, else to remain in full force and effect.

Witness our hands this 6th day of Aug., 1921.

Witness our hands this 6th day of August, 1921.

JAMES A. BAKER,
Receiver of the International and Great Northern Railway Company.
INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY.
J. A. PONDRON.
FRANCES MARIA DILLINGHAM,
Executrix.
EDWIN KIRKE DILLINGHAM,
Executor of the Last Will of Charles Dillingham, Dec'd.
By DABNEY AND KING and
SAM'L B. DABNEY,
Their Attorneys.
UNITED STATES FIDELITY & GUARANTY Co., *Surety.*
By P. H. MOORE,
Its Attorney in Fact.

[SEAL.]

Bond to Operate as a Supersedeas.

STATE OF TEXAS,
County of Dallas:

I, the undersigned, do solemnly swear, that I am attorney in fact of the above stated Surety Company, surety on the foregoing bond, and that it is worth in its own right, at least the sum of
811 $1,000,000, after payment of all its debts of all descriptions, whether individual or security debts, and after payment of all lien debts, if any, on its properties, which are known to me. I reside in Dallas County, Texas.

P. H. MOORE.

Sworn to and subscribed before me this 6th day of August, 1916.
[SEAL.] ALBERT B. HALL,
Notary Public in and for Dallas County, Texas.

Approved this 6th day of August 1921.
NELSON PHILLIPS,
Chief Justice of the Supreme Court of Texas.

Endorsed: James A. Baker, Receiver of the International and Great Northern Ry. Co., et al., Plaintiffs in Error, vs. Karl L. Druesedow et al., Defendants in Error. Bond on Writ of Error from the Supreme Court of the United States. Filed in Supreme Court of Texas, August 8, 1921. F. T. Connerly, Clerk.

812 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Justices of the Supreme Court of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Texas, before you, or some of you, in the suit between James A. Baker and Cecil A. Lyon Co-Receivers of the International and Great Northern Railway Company, et al., versus Karl L. Druesedow, Tax Collector of Harris County, Texas, W. H. Ward County Judge, W. H. Lloyd, J. A. Smith, W. H. Kiser and D. Barker, County Commissioners, all of said County, No. 3272 in the Supreme Court of Texas, and there styled, Karl L. Druesedow, et al., Plaintiffs in Error versus James A. Baker, Receiver, et al., Defendants in Error, wherein was drawn in question an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a Statute of or an authority exercised under the State on the ground of their being repugnant to the Constitution, Treaties or laws of the United States, and the decision was in favor of their validity, and the judgment of the Court of Civil Appeals in favor of Baker, et al. reversed, and the judgment of the Trial Court against Baker et al., affirmed; a manifest error hath

happened to the great damage of James A. Baker, and Cecil A. Lyon Co-Receivers and to said Railway, and to J. A. Pondran and Charles Dillingham, deceased, and to James A. Baker now sole Re-
813 ceiver of said Railway, Cecil A. Lyon having deceased, and to Frances Maria Dillingham, and Edwin Kirke Dillingham, Ex-cutrix and Executor of the lost Will of Charles Dillingham, Deceased, the said Pondran and Dillingham having been sureties on the appeal bond given by appellants from the District Court of Texas to the Court of Civil Appeals, and judgment running also against them, in the Supreme Court of Texas; and whereas also the said County Officials all having gone out of office except D. Barker, and A. R. Miller being now Tax Collector, and Chester H. Bryan, County Judge, and R. H. Spencer, John G. Martin, W. G. Sharman and D. Barker, County Commissioners, all of Harris County, Texas, and all also made parties hereto (as by Petition for Writ of Error appears) and as by their (that of Baker et al.) complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and procedings aforesaid, with all things concerning the same, to the Supreme Court of the United States acording to law, together with this writ, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme
814 Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 8th day of August, in the year of our Lore, one thousand nine hundred and twenty one.

[The Seal of the U. S. District Court, Western Dist., Texas.]

D. H. HART,
Clerk of the District Court of the United States for the Western District of Texas, Austin Division.

Allowed by me,
NELSON PHILLIPS,
Chief Justice of the Supreme Court of Texas.

[Endorsed:] Jas. A. Baker, Receiver, et al., Plaintiffs in Error, vs. Karl L. Druesdow, Tax Collector Harris County, et al. Writ of Error. Filed in Supreme Court of Texas, August 8 1921. F. T. Connerly, Clerk.

815 UNITED STATES OF AMERICA, ss:

The President of the United States to Karl L. Druesedow, Tax Collector of Harris County, Texas, W. H. Ward, County Judge, W. H. Lloyd, J. A. Smith, W. H. Kiser, and D. Barker, County Commissioners of said County, and to A. R. Miller present Tax Collector of Harris County, Texas; Chester H. Bryan, present County Judge, R. H. Spencer, John G. Martin, W. G. Sharman and D. Barker, present County Commissioners of said Harris County, Texas, the said Druesedow, Ward, Lloyd, Smith and Kiser having been succeeded in their respective offices by the said Miller, Bryan, Lloyd, Smith and Kiser, pending this suit, and said Barker being reelected, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., according to law, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Texas, wherein James A. Baker, Receiver of the International and Great Northern Railway Company, and said Company, and J. A. Pondran and Frances Maria Dillingham, and Edwin Kirke Dillingham, Executrix and Executor of the last Will of Charles Dillingham, deceased, are Plaintiffs in Error and you are Defendants in Error to show cause, if any there be why the judgment and decree rendered against said Plaintiffs in Error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not
816 be done to the parties in that behalf.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 6th day of August, A. D., 1921, and of the independence of the United States the 145th year.

NELSON PHILLIPS,
Chief Justice of the Supreme Court of Texas.

Attest with seal of The District Court of the United States for the Western District of Texas at Austin, Texas this 8th day of August, 1921.

[Seal of the U. S. District Court, Western District of Texas.]

D. H. HART,
Clerk of said Court.

We, the undersigned, attorneys for the defendants in error mentioned in the foregoing citation signed by Chief Justice Phillips, do hereby accept service of the citation in this cause, of which the above is the original, and do hereby waive the issuance and service of such citation upon defendants in error or upon us. We also accept notice of the lodging with the Clerk of the Supreme Court of Texas,

of the writ of error in this case, and a copy thereof on our behalf, and do waive any further service thereof.

LOUIS, CAMPBELL & NICHOLSON,
FISHER, CAMPBELL & AMERMAN,
C. M. CURETON,
Attorney General of Texas,
TOM L. BEAUCHAMP,
Assistant Attorney General,
Attorneys for the Defendants in Error Above Referred To.

Ben F. Looney is no longer Attorney General and Luther Nichols is not an assistant. C. M. Cureton and Tom L. Beauchamp are their respective successors.

TOM L. BEAUCHAMP.

I am no longer an attorney in the above styled cause & therefore cannot waive service.

SEWALL MYER.

Dated Aug. 10, 1921.

816½ [Endorsed:] James A. Baker, Receiver et al., Plaintiffs in Error, vs. Karl L. Druesdow, Tax Collector, et al., Defendants in Error. Citation. Filed in Supreme Court of Texas August 8, 1921. F. T. Connerly, Clerk.

817 *Assignment of Error.*

Filed August 8, 1921.

JAMES A. BAKER, Receiver, et al.,

vs.

KARL L. DRUESEDOW, Tax Collector of Harris County, Texas, et al.

Assignment of Errors.

This is the case styled in the Supreme Court of Texas, Karl L. Druesdow vs. James A. Baker, Receiver et al., No. 3272 in that Court.

Now come the Plaintiffs in Error, James A. Baker, et al., Petitioners for a Writ of Error, and respectfully show that in the record, proceedings, decision and final judgment of the Supreme Court of Texas in the above entitled case, there is manifest error in this:

The errors assigned were committed by the Court in approving the opinion of the Commission of Appeals, Section A, given by Judge R. F. Spencer, Commissioner of Appeals, and by the judgment of March 23, 1921, and by over-ruling the motion for a re-hearing, on May 21, 1921, in the following particulars, to-wit:

I.

The Court erred in failing and refusing to uphold the finding of law of the Court of Civil Appeals and reversing the same, wherein the Court of Civil Appeals held that the intangible tax statute of the State of Texas, (Chapter 4, Title 126 of the Revised Statutes of Texas) did not authorize the valuation of tangibles as intangibles, nor the valuation of tangibles for taxation by the State Tax Board; and wherein the Court of Civil Appeals held that it is clear that the
818 Statute has no such meaning and cannot be construed to confer any such power upon the State Tax Board, and wherein it held: "That Board had no power to pass upon, correct, or in any way change the valuation of tangible property as fixed (by the County authorities) in the rendition and assessment of such property for taxation." And wherein that Court held that, if the Statute be construed to give this power to the State Tax Board and to authorize the State Tax Board to apportion such values "among the various counties of the State, as provided in this Statute, would be clearly obnoxious to the provisions of the Constitution, which requires tangible property to be assessed in the county in which it is situated (Constitution of Texas, Art. 8, Sections 1, 8, 11, 14 and 18). This Court refusing to pass affirmatively upon such point, and over-ruling the Court of Civil Appeals, and thereby construing the statute to mean that the State Tax Board had such power, which ruling upholding the validity of the statute as construed by the State Tax Board is repugnant to the first section of the 14th Amendment to the Constitution of the United States. Whereby, the tangibles of this railway are distributed for taxation into the counties in which they do not exist, contrary to the provisions of the State Constitution (Art. 8, Sections 1, 8, 11, 14 and 18) and the equality of valuation therein guaranteed and in denial of the protection awarded under the first section of the 14th Amendment to the Constitution of the United States, and of the due process of law and the equality guaranteed thereby; it being admitted and also proved by all the evidence in this case and found by the Court of Civil Appeals, and not denied by this Court, that tangibles were so valued as intangibles, and distributed on a mileage basis; whereby, tangibles of this Railway will be taxed in counties where they do not exist, and whereby its tangibles will also be taxed in counties where they do exist, having been valued there in accordance with law on equality with tangibles of other taxpayers, and whereby inequality of valuation for taxation necessarily results and inequality of taxation.

819

II.

The Court erred in construing the intangible tax Statute of the State of Texas (Chapter 4 Title 126 of the Revised Statutes of Texas), in conflict with the construction placed thereon by the Court of Civil Appeals, and in up-holding the State Tax Board in its construction and its action, in valuing tangibles as intangibles, and in holding

that they could be distributed for taxation into counties where they did not exist, in conflict with provisions of the Constitution of Texas, to-wit: of Art. 8, Section- 1, 8, 11, 14 and 18, requiring equality of valuation for ad valorem taxation, and also, that tangibles should be valued for taxation and taxes paid thereon, only in counties where they were. The court taking the position and making this construction of this intangible tax statute and thereby ruling that the tangibles of a railway could so be valued for taxation and taxed; whereby the court has affirmed the validity of this statute as thus construed, although repugnant to the First Section of the 14th Amendment to the Constitution of the United States as to the due process of law and the equality provided therein; whereby said statute, as thus construed has been drawn in question; this statute not applying to all property in this State or property of all owners, and whereby in conflict with such provision, it is ruled that the railway tangibles may be distributed for taxation into other counties, and may be taxed in such other counties; and be again valued and taxed systematically and to an amount in excess of the equal valuation and taxation resting on other owners, and already imposed on the Railway's property, by valuation and levy by the County authorities.

III.

The Court erred; having refused to mention or adopt the construction of the State intangible tax statute, made by the Court of Civil Appeals, it having held and construed such statute not to authorize the valuation of tangibles under the form of intangibles, and
820 their distribution into different counties on a mileage basis for taxation; in refusing to hold such statute, as construed and enforced by the State Tax Board, and the Board's action thereunder void, and all acts thereunder a nullity. Because the State Constitution and Statutes provide for the valuation and taxation of the tangibles in the counties where they are, that is of the tangibles of all persons; and because, in holding railway tangibles can be valued by the State Tax Board and distributed on a mileage basis to any extent as valued and distributed by the Board to some extent. (They having been equally valued and taxed by the County Authority) the First Section of the 14th Amendment to the Constitution of the United States, is violated, and the State intangible tax statute, as construed and enforced by the State Tax Board, and that action maintained by the Supreme Court of Texas, is repugnant to the First Section of the 14th Amendment to the Constitution of the United States, in that equality before the law and due process is violated; because the tangibles of the railway had already been valued and placed on the tax rolls for taxation by the Tax Assessors and Board of Equalization of the different counties, on an equality of valuation with the tangibles of other owners, and because tangibles are again taxed on an additional valuation, in excess of tangibles of other owners, and this enforcement of the Statute so construed, is in violation of Sections 1, 8, 11, 14 and 18 of Art. 8 of the Constitution of Texas by depriving this Railway of the equality and guarantees thereof, pre-

served for other owners; and in violation of the requirements of the Statute of Texas relating to tangibles, taxed and valued for taxation locally, preserved to other owners, all as provided in Chapters 11 and 12 of Title 126, of the Revised Statutes of Texas; and therefore, of the First Section of the 14th Amendment to the Constitution of the United States.

821 IV.

The Court erred in adopting the construction of the State Tax Board, of the intangible tax statute, in conflict with the construction thereof given by the Court of Civil Appeals in this case, or after so construing the Statute, in refusing to hold it void, and in enforcing it and the Acts of the State Tax Board thereunder, whereby the validity of the statute, as construed by the Supreme Court of Texas is drawn in question, as being repugnant to the First Section of the 14th Amendment to the Constitution of the United States; the construction of this Court (or its refusal to set aside the construction and action thereon of the Board), and of the State Tax Board and bringing about systematic inequality of valuation and taxation of property of this Railway in comparison with valuation and taxation of property of other owners, valued and taxed under other laws, preserving the equality guaranteed by the State Constitution.

V.

The Court erred, in reversing and rendering this case setting aside the judgment of the Court of Civil Appeals and affirming that of the Trial Court, in direct conflict with Article V, Sections 3 and 5 of the Constitution of Texas, this court not having the jurisdiction so to do under the Constitution and Statute in pursuance thereof (R. S. of Tex. Art. 1590). The Court of Civil Appeals having found that the claimed intangibles of $10,743,223.00 did not exist and that there was no evidence that they did exist, and that the evidence completely showed that they did not exist, and that the finding that they did exist was the arbitrary finding of the State Tax Board without any support, and the Supreme Court having no jurisdiction to finally find that they did exist; whereby that Court was without jurisdiction and without authority to render the judgment in this case, which it did render by affirming the Trial Court; whereby there is drawn in question an authority exercised under the State, on the ground of the same being repugnant to the Constitution of the United States, to-wit:

822 To the First Section of the 14th Amendment, and the provision therein for equality before the law and due process of law prohibiting the Supreme Court of Texas from entering a judgment, which it has no jurisdiction or authority whatsoever to enter under the laws and Constitution of Texas; that Court having no jurisdiction to render this case against the expressed findings of fact of the Court of Civil Appeals; the statute providing that the "judgment of the Courts of Civil Appeals shall be conclusive in all cases, on the facts of the case." (R. S. 1590); and the Constitution providing

that their decision "shall be conclusive on all questions of fact brought before them on appeal of error" (Const. of Tex. Art. 5 Section 6). The Supreme Court of Texas constantly holding that it has no power to render such a judgment.

VI.

The court erred in finding that there was evidence to support the existence of tangibles, as found by the State Tax Board in the amount of $10,743,223.00, because there was no evidence to support the same, and the Court of Civil Appeals found that there was no evidence and that the finding of the State Tax Board was arbitrary without evidence and against all evidence, and based on certain formulas set out in the opinion of the Court of Civil Appeals, which were irrelevant and that the only other ground was valuing tangibles as intangibles, which was unconstitutional and no ground; and the Court erred in upholding such finding as made under the intangible tax statute, and thereby upholding the validity of the Statute as construed by the Board, in conflict with the First Section of the 14th Amendment to the Constitution of the United States.

VII.

The Court erred in refusing to sustain and mention the fact, found by the Court of Civil Appeals, that it is fraudlent for the
823 State Tax Board to refuse to explain what basis they had, if any, outside of the formulas; it being undisputed in evidence that they did so refuse to state, in violation of the First Section of the 14th Amendment to the Constitution of the United States, and the guaranty of the rights of plaintiffs in error therein.

VIII.

The Court erred in refusing to find, as found by the Court of Civil Appeals, and which finding was supported by all of the evidence, to wit:

That in the hearing before the board it was proved that the board had used certain formulas, and that:

"No evidence was offered in support of the Board's action, and no reason given therefor, except the formula, but the plaintiffs proved without controversy the following facts:

"(*a*) The amount of stocks and bonds of the railway outstanding on December 21, 1914, including equipment notes, all taken at par, was $32,154,000, of which $4,822,000 was stock, and the Railroad Commission's valuation was $32,471,027.05, to which might be added additions and betterments not then valued by the Railroad Commission of book cost of $1,542,065.02.

"(*b*) The railroad paid interest at 6 per cent on its first mortgage bonds, amounting to $11,290,500, and partly out of Receiver's cer-

tificates, and that the second mortgage had been foreclosed and interest on its bonds was in default.

"(*c*) The tax board was placing a premium of $8,112,533 on the capital stock of par, $4,822,000, although this stock had been foreclosed and was worthless.

"(*d*) The properties had been foreclosed in 1910-11, and sold out, and unsecured debts of over $7,000,000 and third mortgage bonds of approximately $3,000,000, and a stock capitalization of $9,755,000 were eliminated and thrown away.

"(*e, f, g*) The net income above operating expenses for 1914 was $65,405, which would capitalize at 7 per cent $934,361, and for the calender year of 1913, $1,153,660.92, which would capitalize at 7 per cent $16,523,727.43, and for the calendar year 1912, $2,084,-149.50, which would capitalize at 7 per cent $29,773,564.28. It was shown that no income had ever been paid on the stock of the railroad, except on preferred stock for one year, and that the taxes had increased on the properties from 1904 $127,304.81, to, for
824 1914, $371,420.22". (Opinion of Court of Civil Appeals found herein, and 197 S. W., 1044.)

"The undisputed evidence adduced upon the trial shows that, upon a hearing by the State Tax Board on June 18, 1915, after notice to plaintiff to appear and show cause why a valuation of the intangible property of the railway company theretofore made by the board should not be made final, the board, after considering plaintiffs' protest, and the evidence offered by them, adopted its corrected preliminary valuation, fixing the valuation of said intangibles at the sum of $10,743,-223, and apportioned and certified said valuation to the various counties in accordance with the provisions of the statute. The amount so apportioned and certified to Harris County was $603,-227.00. The state and county taxes assessed in Harris county on said sum amount to $6,605.34. At said hearing plaintiffs showed that the valuation of the physical properties of the railway company as fixed by the State Railroad Commission sometime previous to this hearing was $32,471,027.05, and that since said valuation was made betterments valued at $1,542, $65 had been added to the property, making the aggregate valuation of the tangible property of the railway $34,013,092.07.

"The aggregate of the stocks, bonds and lien obligations of every character of the railway was shown to be $32,154,000. It was further shown that the properties now owned by the railway company, except some additions, which have been since made, were sold out under mortgage foreclosure in 1911 in a suit brought by bondholders of the now defunct International & Great Northern Railroad Company and bought in by the present International & Great Northern Railway Company, which was organized for the purpose of purchasing and operating the sold-out company. By this foreclosure the capital stock of $10,000,000 and indebtedness to the amount of $8,000,000 of the old company were wiped out. The present company was placed in the hands of receivers on August 10, 1914, for

default on its mortgage indebtedness and decree of foreclosure had been entered on May 17, 1915.

"The properties were shown to have been well managed for the past 14 years, and the net average income during that time was 4.25 per cent on the Railroad Commission's valuation. The average net income for the year 1912, which was shown to be the best year in the history of the properties, was $2,084,149.50, which capitalized at 7 per cent, the average rate of interest in the section through which the railway operates, would show a valuation of $29,743,564.28. The net income for 1913 at 7 per cent would capitalize $16,523,727.43. The net income for the year 1914 at 7 per cent would capitalize $934,361.

"All of the facts above stated were shown in the trial in the court below by the undisputed evidence. At the hearing before mentioned plaintiffs, in writing, requested the board to give the data or information on which it based its findings of the value of the intangible property of the railroad. *In response of the railroad.* In response to this request, it furnished the following formula, which it had used in ascertaining said value:

825

Gross receipts, 1911	$9,782,165	
Gross receipts, 1912	11,254,327	
Gross receipts, 1913	10,902,041	
Gross receipts, 1914	9,645,785	
Total		$41,584,318
$41,584,318 ÷ 4		10,396,079
Capital stock issued and outstanding	4,822,000	
	26,181,500	
Total Capitalization		$31,003,500
$10,396,079 ÷ 31,003,500 =	33.53 Ratio.	
	12.50 ratio T. & P.	
33.53 × 12.50 =	268.24 ratio.	
$4,822,000 × 268.24	$12,934,533	
Mortgage debt at par	26,181,500	
True value		$39,116,033
Physical value (assessed value)		28,372,810
Intangible value		$10,743,233

"The Texas & Pacific Railroad Company ratio used in this formula was obtained by the following formula applied to the earnings, indebtedness and tangible values of that road:

"State Tax Board, Austin, Texas.

Texas & Pacific Railroad Co.

Gross receipts, 1911		$11,079,618	
Gross receipts, 1912		12,341,684	
Gross receipts, 1913		12,381,305	
Gross receipts, 1914		11,745,562	
			$47,548,169
$47,548,169 ÷ 4			11,887,042
Stock issued and outstanding		$38,763,810	
Bonded Debt:			
First Mortgage (par)	$24,992,975		
First Mortgage (par)	4,970,000		
Second Mortgage (par)	24,987,036		
	$54,950,011		
Secured interest accrued	1,498,500		
Total		$56,488,511	
		$56,488,511	
Total Capitalization			95,212,321
$11,887,042 ÷ 95,212,321 = 12.48 ratio.			
38,763,819 × 12.50 val. stk		4,845,476	
Lien obligations		56,448,511	
True value, Texas share,			
$61,293,987 × 57.60			35,305,336
Physical value			15,588,147
Intangible value			$19,717,189"

(Opinion, and 197 S. W., 1046).

826 "It is shown from the whole evidence that the alleged intangible values of the railway company were found by increasing the par value of its capital stock by the application of the formula and reducing the value of its physical properties below the amount fixed by the State Railroad Commission, and shown by the undisputed evidence to be their fair value, and from the sum of the mortgage indebtedness and the value of the stock so fixed by the board, deducting the decreased value of the physical properties. Unless this process can be held sufficient to show that the railway company has intangible values upon which the assessment can be based, there is no evidence of the existence of said values." (Opinion, and 197 S. W., 1047.)

"Our conclusion of fact, from a consideration of all the evidence,

is that the International & Great Northern Railway Company had no intangible property taxable under the laws of this State, when the taxes sought to be enjoined were assessed thereon, and the fixing of such values by the State Tax Board was the arbitrary finding of values that did not exist.

"Upon these facts appellants are entitled to protection against the collection of the taxes unless such right is defeated upon grounds urged by appellee, and which will be hereinafter considered." (Opinion, and p. 1048, 197 S. W.)

"We have found that the so-called 'rule of three' formula, applied by the board to ascertain the value of the stock, cannot be so applied upon any mathematical principle or rational theory, and its general application produces unjust discrimination between railroads. There is no evidence upon which the value of the stock fixed by the board can be sustained, and when called upon and urged by the appellants upon the hearing before it to disclose what, if any, evidence or information it had which tended to disprove the showing made by appellants that no such values existed, the board only offered its 'rule of three' formula." (Opinion, and 197 S. W. p. 1048, 2nd column.)

"The board refused to explain its process, or to state the basis of its action, and on what basis of evidence it was acting in making this assessment, and refused to state why, in the formula, they had valued the stock of the insolvent and foreclosed railroad at $12,934,533, its par being $4,822,000, except that the board insisted that the formula was correct." (Opinion, and p. 1044, first column, 197 S. W.)

And the Court erred in refusing to so find, and found against all evidence and without any evidence, that the State Tax Board had support in the evidence that intangibles existed of the value of $10,743,223.00, such finding, as well as that of the Board being against the provisions for due process of law and equality before law, guaranteed by the First Section of the 14th Amendment to the Constitution of the United States, and involving pure con-
827 fiscation; the Board having based its finding on the Construction of the Intangible tax statute, that tangibles should be valued thereunder, whereby the validity of the Statute is drawn in question, as involving inequality and double taxation in conflict with Section 1 of the 14th Amendment to the Constitution of the United States.

IX.

The Court erred in stating that there was warrant for the finding of the Board when there is no warrant whatsoever in the evidence for such finding, whereby the Court has entered judgment supporting the action of the Board, which in turn was without any support whatsoever, as found by the Court of Civil Appeals. Whereby, if this judgment stands, the due process and the equality provisions of the First Section of the 14th Amendment to the Constitution of the United States will be violated.

X.

The court erred in denying the claim for equalization in the event that there should be held to be some intangibles, and in refusing to equalize the valuation of such intangibles, if any, on the ground that though intangibles were valued at full value, tangibles of the Railway had been undervalued. Because, the Trial Court enormously raised the valuation of the Railway's physicals in Harris County, without making a corresponding deduction from the State Tax Board's valuation of intangibles, which was required to be made under the intangible tax statute, in order to arrive at intangibles whereby there was double valuation and resulting double taxation in violation of Section 1 of Art. 8 of the Constitution of Texas, and of Section 1 of the 14th Amendment to the Constitution of the United States.

XI.

The Court erred in denying the claim for equalization, in the event that there should be held to be any intangibles, on the ground that although intangibles were placed at full value, the Railway's physicals had been undervalued, below parity with other tax
828 payers—because, there was no evidence whatever to show that these physicals had been valued below parity, but all of the evidence showed that they had been valued at or above parity, and that much of the property of other persons had been systematically omitted from valuation and escaped all taxation, in violation of the equality provision of valuation for advalorem taxation of Art. 8, Section 1 of the Constitution of Texas, and in denial of the equality and due process of law guaranteed by Section One of the 14th Amendment to the Constitution of the United States.

XII.

The Court erred, having held that there were intangibles to the full amount claimed, in holding that plaintiffs were not entitled to equalization down to tax valuations of other persons on ground that their property had been systematically undervalued as claimed or released from all taxation, there being no testimony as to value of the Railway's tangibles being above parity except that of Kelly and Parker, as claimed; Parker having testified to the reproduction cost and Kelly on basis of values of abutting property, over the objections of the plaintiffs that the sole basis for the valuation for tax purposes, is the valuation of the railway as impressed with the public use obligation, such testimony being given in collision with the provisions of the First Section of the 14th Amendment to the Constitution of the United States.

XIII.

The Court erred in decreeing that the plaintiffs had shown no equity, and in up-holding the assessment of the State Tax Board,

because such finding was contrary to all evidence in the case, it being proved without dispute that the value of the stock of the railway as found by the State Tax Board, to be $12,934,553.00 was unfounded, such stock being valueless and foreclosed, and it being fully shown that the State Tax Board did not act in good faith in making
829 such assessment and valuation, whereby to maintain such valuation is to deprive the owners of their property without due process of law and in conflict with the First Section of the 14th Amendment to the Constitution of the United States.

XIV.

The Court erred in refusing to hold that: The assessing board cannot be considered to have acted in good faith when the board, against all evidence and the undisputed evidence before it, values foreclosed stock of the par value of $4,822,000, proved to be worthless, at $12,934,533; there being obligations ahead of the stock of $30,574,-470, and when it was shown that the property had been well managed; but that with over fourteen years' experience its net income at six per cent would capitalize less than $21,000,000, and when the Board found the total value of the properties to be $30,116,033, and did this on formulas which no rational mind acting in good faith could follow; all of these facts having been proved on this trial and to the Board before it had finally acted; and furthermore, to so assess and to exact taxes for assessments so made, amounts to the taking of property without due process of law, and denies equality before the law, in violation of Sec. 1 of the XIV Amendment to the Constitution of the United States, and of the Constitution of Texas.

XV.

The Court erred in decreeing that the plaintiffs show no equity, upon any branch of the case, and in upholding the finding of the State Tax Board as to the value of the alleged intangibles; because the intangibles were found upon formulas which, when applied to other railways grossly favored these railways, competitors of the International & Great Northern Railway Company and co-taxpayers, all as shown in the evidence without dispute, whereby the court's finding is unsupported, and in contradiction to the evidence.
830 All in conflict with the provisions for equality before the law, secured by the First Section of the 14th Amendment to the Constitution of the United States.

XVI.

The Court erred in refusing to hold as it did refuse, that when an assessing authority, to-wit: the State Tax Board of Texas, assessed a tax payer a thing not owned by him or to a greater extent than he does own it, then such an assessment so made is illegal and to enforce it means to take property without due process of law and violates the equality secured by the law, as provided in Section

One, of the 14th Amendment to the Constitution of the United States and in Sections 13 & 19, Article I Section I of Article 8 of the Constitution of Texas, and the court erred in not holding that when the State Tax Board assessed to this railway intangibles to the extent of $10,743,223.00 they assessed to it a thing—

(*a*) Shown without contradiction in the evidence not to be owned by it.

(*b*) If there were intangibles, which is denied, then they do not exist to the extent assessed but in some small amount whereby by imposing upon the railway such fictitious intangibles, a basis was laid for taxation to be taken out of property which did exist.

XVII.

When an assessing authority makes a gross error, shocking all sense of equity; and especially when this is made on a system, as on the application of wrong formulas and principles, the assessment should be set aside, and this is legal fraud, without regard to intent, and the Court erred in not so ruling.

The assessment of the I. & G. N. Ry. Co. was such a gross error, in that its stock (of $4,822,000 par) was valued at a premium of over $8,000,000, although the road was insolvent and the stock foreclosed, and in that the road was found to have intangible values amounting to $10,743,223; whereby there was denied to the plaintiffs due process of law and equal protection of the law, in
831 violation of Sec. I of the XIV Amendment to the Constitution of the United States, and of the Constitution of Texas (Art. 1, Secs. 13 and 19 and Art. VIII, Sec. 1). And the Court erred in not so finding.

Respectfully,

JAMES A. BAKER,
Receiver of the International and Great Northern Railway Company, and said Railway;
J. A. PONDRON,
FRANCES MARIA DILLINGHAM,
Executrix;
EDWIN KIRKE DILLINGHAM,
Executor of the Last Will of Charles Dillingham, Deceased,
By DABNEY AND KING,
SAML. B. DABNEY,
Their Attorneys and Counsel.

Identified, This August 6, 1921.
NELSON PHILLIPS,
Chief Justice Supreme Court of Texas.

Endorsed: James A. Baker, Receiver, et al., vs. Karl L. Druesdow, Tax Collector of Harris County, Texas, et al. Assignment of Errors. Filed in Supreme Court of Texas, August 8, 1921. F. T. Connerly, Clerk.

832

Prayer for Reversal.

Filed August 8, 1921.

In the Supreme Court of the United States.

JAMES A. BAKER, Receiver International and Great Northern Railway Company, et al., Plaintiffs in Error,

versus

KARL L. DRUESEDOW, Tax Collector Harris County, et al., Defendants in Error.

Prayer for Reversal.

Now come James A. Baker, Receiver of the International and Great Northern Railway Company, and said Railway, and J. A. Pondron and Frances Maria Dillingham, and Edwin Kirke Dillingham, Executrix and Executor of the last Will of Charles Dillingham, deceased, plaintiffs in error, and pray for reversal of the judgment and decree of the Supreme Court of Texas, rendered March 23rd, 1921, and affirmed May 25, 1921, by that Court over-ruling a motion for rehearing; reversing and rendering the judgment of the Court of Civil Appeals of the First Supreme Judicial District of Texas; and affirming the judgment of the District Court of Harris County, Texas, in favor of Karl L. Druesedow, Tax Collector, et al., as in said judgment set out, and against James A. Baker, Receiver, et al., as in said judgment set out; these petitioners having applied for and obtained a Writ of Error to review and correct said judgment of the Supreme Court of Texas.

JAMES A. BAKER,
Receiver of the International and Great Northern Railway Company, and said Railway;
J. A. PONDRON,
FRANCES MARIA DILLINGHAM,
Executrix;
EDWIN KIRKE DILLINGHAM,
Executor of the Last Will of Charles Dillingham, Deceased,

833

By DABNEY AND KING,
SAML. B. DABNEY,
Attorneys for the Plaintiffs in Error.

Endorsed: In the Supreme Court of the United States. James A. Baker, Receiver of the International and Great Northern Railway Company et al., Plaintiffs in Error, vs. Karl L. Druesdow, Tax Collector, Harris County, et al., Defendants in Error. Prayer for Reversal. Filed in Supreme Court of Texas, August 8, 1921. F. T. Connerly, Clerk.

Præcipe.

Filed August 8, 1921.

JAS. A. BAKER, Receiver of the International & Great Northern Railway Company, et al., Plaintiffs in Error,

vs.

KARL L. DRUESEDOW et al., Defendants in Error.

Præcipe.

F. T. Connerly, Esq., Clerk of the Supreme Court of the State of Texas.

DEAR SIR:

Writ of error having been granted in the above case from the Supreme Court of the United States to the Supreme Court of Texas, we request you to insert in the record which you are preparing the following, as near as may be in the order here stated:

1. This Præcipe.

2. The record sent up from the Court of Civil Appeals to your Court.

3. The statement of facts sent up from the Court of Civil
834 Appeals to your Court.

4. The judgment of the Court of Civil Appeals of the First Supreme Judicial District.

5. The petition for the writ of error filed in this Court, praying a writ of error from this Court to the Court of Civil Appeals.

6. Writ of error granted by this court to Karl L. Druesedow et al., and the order, if any, granting this writ, and bond given on granting writ.

7. The answer, if any, to the application for the writ of error, filed by Druesedow et al. in this Court.

8. The opinion of the Court of Civil Appeals of the First Supreme Judicial District, in this case.

9. The opinion of the Commission of Appeals adopted by the Supreme Court of Texas.

10. The judgment of the Supreme Court of Texas in this case.

11. The motion for rehearing filed in this Court by Baker, Receiver, et al.

12. The judgment of this Court overruling said motion for rehearing.

13. The petition for allowance of writ of error, the fiat of Chief Justice Phillips allowing the same, and all exhibits attached thereto.

14. The assignment of errors accompanying the petition for a writ of error.

15. The citation in error in this case, signed by Chief Justice Phillips, on allowing the writ of error.

16. Copy of the citation, signed by Chief Justice Phillips, to which is attached acceptance of service of the writ of error and of notice of filing the same, and acceptance of service of the citation by the defendants in error.

835 17. The bond, approved by Chief Justice Phillips, on allowing the writ of error.

18. The writ of error filed herein.

19. Motion for reversal, filed in this Court, by plaintiffs in error.

20. Your certificate, in ample form, to all of the above.

Yours truly,

JAMES A. BAKER, RECEIVER, ET AL.,
Plaintiffs in Error.
By DABNEY & KING & SAML. B. DABNEY,
Their Attorneys.

We accept service of the above præcipe.

KARL L. DRUESEDOW ET AL.,
Defendants in Error,
By FISHER, CAMPBELL & AMERMAN,
LOUIS, CAMPBELL & NICHOLSON,
Their Attorneys.
C. M. CURETON,
Attorney General of Texas.
TOM L. BEAUCHAMP,
Asst. Atty. General.

Ben F. Looney is not now Attorney General of Texas, and Luther Nickels is not an Assistant. C. M. Cureton and Tom L. Beauchamp are their respective successors.

TOM L. BEAUCHAMP.

I am no longer an attorney in the above styled cause & therefore can not accept service.
Dated Aug. 10, 1921.

SEWALL MYER.

August 9, 1921.

Endorsed: Jas. A. Baker, Rec'r of the I. & G. N. Ry. Co., et al., Plffs. in Error, vs. Karl L. Druesedow et al., Defts. in Error. Præcipe. Filed in Supreme Court of Texas, August 8, 1921. F. T. Connerly, Clerk.

836 Clerk's Office, Supreme Court of Texas.

I, F. T. Connerly, Clerk of the Supreme Court of the State of Texas, do hereby certify that the foregoing eight hundred and thirty-five pages,—except pages 812, 813 and 814, and pages 815 and 816,—contain a true and correct copy of all the proceedings had in the District Court of Harris County, Texas, in the Court of Civil Appeals of the First Supreme Judicial District of Texas, at Galveston, and in the Supreme Court of Texas, as the same appear of record and on file in this office, and as called for by the Præcipe herein filed on August 8th, 1921, in cause No. 3272, Karl L. Drusedow, Tax Collector, et al., Plaintiffs in Error, vs. James A. Baker et al., Receivers, et al., Defendants in Error, and that the foregoing is a complete transcript of the whole record in this Court.

I further certify that the pages herein numbered 812, 813 and 814 is the original writ of error, of which a copy has been lodged and is now on file in this office; and that the pages herein numbered 815 and 816 is the original citation in error, copy of which has been lodged and now on file in this office.

In testimony whereof, I have hereto signed my name and affixed the seal of the Supreme Court of Texas, at the City of Austin, this the 16th day of August, A. D. 1921.

[Seal of Supreme Court of the State of Texas.]

F. T. CONNERLY,
Clerk of the Supreme Court of the State of Texas.

Endorsed on cover: File No. 28443. Texas Supreme Court, Term No. 488. James A. Baker, Receiver of the International & Great Northern Railway Company et al., plaintiffs in error, vs. Karl L. Druesedow, Tax Collector of Harris County, Texas, et al. Filed August 22d, 1921. File No. 28443.

IN THE
SUPREME COURT
OF THE UNITED STATES

JAMES A. BAKER, RECEIVER OF THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, ET AL.,
Petitioners,

vs.

KARL L. DRUESEDOW, TAX COLLECTOR OF HARRIS COUNTY, TEXAS, ET AL.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

(Supporting Brief Separately Presented.)

Now come James A. Baker, Receiver of the International & Great Northern Railway Company, and The International & Great Northern Railway Company, a corporation, and J. A. Pondran, and Frances Maria Dillingham, and Edwin Kirke Dillingham, Executrix and Executor of the last will of Chas. Dillingham, deceased, and petition for a writ of certiorari to the Supreme Court of Texas to review its decision in this case, and exhibits herewith a certified copy of the entire transcript of the record of the case, including all proceedings in that court, and in support of this petition, represent:

I.

Summary and Short Statement of the Matter Involved.

The Court of Civil Appeals (of Texas) holds all of the action of the State Tax Board, herein involved, as void and unconstitutional. The Supreme Court (of Texas) upholds the Board.

This case originated in the iDstrict Court of Harris County, Texas, by suit filed by James A. Baker, Receiver, et al., for an injunction to restrain the collection of taxes on account of claimed intangibles. There was a cross-action for the claimed taxes. Upon judgment being given against plaintiffs, they appealed to the Court of Civil Appeals of the First Supreme Judicial District of the State of Texas, and by that court the case was reversed and rendered in favor of the plaintiffs, and appellants, as appears by the judgment and opinions given the 28th of June, 1917, and October 11, 1918. (197 S. W., 1043, and herein.) The appellees, and defendants in the trial court, sued out a writ of error from the Supreme Court of Texas, and the cause having been referred to the Commission of Appeals of that court, for their examination and report, the Commission reported, by Judge Spencer, of Section A, in favor of the reversal of the Court of Civil Appeals, and the affirmance of the District Court, which opinion was adopted by the Supreme Court of Texas, and on March 23rd, 1921, the decree of the Court of Civil Appeals was reversed, and the Supreme Court entered a decree in favor of the plaintiffs in error in that court, defendants in the trial court, and appellees in the Court of Civil Appeals, against James Baker and Cecil A. Lyon, Receivers of said railway, and said railway, for the amount adjudged in the District Court

against them, and for costs against them, and their sureties on the appeal, J. A. Pondran, and Chas. Dillingham, for all costs as in the judgment stated.

The defendants in error, James A. Baker et al., filed a motion for rehearing, which was overruled by the Supreme Court, by its judgment of May 25, 1921, all as appears in the record. (229 S. W., 493.)

This case appears on the docket of the Supreme Court as No. 3272, Karl L. Druesedow, Tax Collector Harris County, Texas, et al., plaintiffs in error, v. James A. Baker, Receiver of the International & Great Northern R'y Co., et al., defendants in error.

Under the rules of practice of the Texas courts, after an appeal is perfected, no notice is taken of death or any substitution made of parties. After the completion of the appeal, Cecil A. Lyon, co-receiver, died, and James A. Baker was appointed sole receiver, all as appears in the record; and Chas. Dillingham, a surety on the cost bond on appeal, died testate, and Frances Maria Dillingham, and Edwin Kirke Dillingham, are the Executrix and Executor of his will, confirmed by the Probate Court, all as appears in the record herewith.

After the completion of the appeal, Karl L. Druesedow, Tax Collector of Harris County; W. H. Ward, County Judge; W. H. Lloyd, J. A. Smith, W. H. Kiser, and D. Barker, County Commissioners of Harris County, Texas, and the original defendants in this case, went out of office, except Commissioner Barker, who was re-elected, and into their places were elected, and have duly qualified, A. R. Miller, present Tax Collector of Harris County, Texas; Chester H. Bryan, present County Judge; R. H. Spencer, John D. Martin, W. G. Sharman, and D. Barker, all present County Commissioners, and successors

to the original defendants herein; D. Barker having been re-elected; and now made parties respondent along with the original defendants, all as appears in the transcript of the record filed herewith, showing their election and qualification into said offices.

The decree of the Supreme Court of Texas was final.

This petition is filed under the provisions of Section 237 of the Judicial Code, as finally amended Sept. 6, 1916. (C., 448, Section 2.)

The Supreme Court of Texas is the highest court, in which a decision could be had in this case, and there the record remains; and wherein certain titles, rights, privileges and immunities, were claimed under the Constitution of the United States, or authority exercised thereunder, and wherein the decision was against the titles, rights, privileges and immunities, specially set up and claimed by the petitioners thereunder.

Counsel for defendants in error are C. M. Cureton, Esq., Attorney General of the State of Texas, and Tom Beauchamp, Esq., Assistant Attorney General of the State of Texas, whose postoffice address is Austin, Texas; and Messrs. Fisher, Campbell & Amerman, and Messrs. Lewis, Campbell & Nicholson, whose postoffice address is Houston, Texas.

The suit was to restrain the collection of taxes claimed by the Tax Collector of Harris County, Texas, and other defendants, for the State and County, for 1915; on an apportionment of the alleged intangibles of the International & Great Northern Railway. For the year 1915, the State Tax Board found that the railway owned intangibles of the value of $10,743,223.00, and declared that their true value, of which amount, on a mileage basis, $603,227.00 was apportioned to Harris County, as that

county has a mileage of 62.1 miles out of the total mileage of the railway of 1106 miles. This amount was placed on the assessment rolls. The rate of taxation in Harris County, State and County, was 1.09½ for $100.00, and this being levied on $603.227.00, taxes on intangibles were claimed for the State and County as collectible, by the Collector of Harris County alone (there being 36 other counties penetrated by the railroad) in the amount of $6,605.34, for which amount, interest and cost, the Collector brought a cross-action.

The case was tried in the State District Court, without a jury, and plaintiffs were denied all relief, and Druesedow as Tax Collector awarded judgment for the amount claimed, plus $61.76 interest from February 1st, 1916, total of $6667.10, with interest from March 28, 1916, at 6 per cent. per annum, and costs. (R., original paging 79-82.)

On the same approximate bases, it will be seen that for the 1106 miles, on the claimed intangibles of $10,734,-223, there would be taxes claimed of over $100,000.00.

The Court of Civil Appeals found that there was no evidence before the Board on its hearing, or on trial, that there were intangibles, that it was affirmatively shown that there were no intangibles, that the Board had rested (a) on certain wrong formulas, which necessarily brought a wrong result and inequality; and (b) on the theory that they had the right to value tangibles under the form of intangibles, as a plus valuation on the valuation made by the local county outhorities, and to distribute these plus valuations of tangibles into the counties where tangibles did not exist, and that the Board had so done; the Court of Civil Appeals finding that the intangible tax statute would be unconstitutional on such a

construction, as it would mean double valuation and taxation and violate equality guaranteed by the State Constitution, the first section of the Fourteenth Amendment to the Constitution of the United States. The claims of the plaintiffs for equalization down to the valuations of other taxpayers was not reached by the Court of Civil Appeals, it holding that there were no intangibles. It is contended that all of the above was well founded and without contradiction in the evidence, as well as the findings of the Court of Civil Appeals, that the action of the Board was *purely arbitrary, unequal, confiscatory,* without any evidence to support it, and in violation of due process of law and equality before the law. The Supreme Court found in opposition to all of the above, and maintained the trial court.

The points are generally set out, below, where is stated the general reasons relied on for the granting of this writ.

The Supreme Court had no power whatever to reverse and render the Court of Civil Appeals, in conflict with issues of fact found by it, as to which its jurisdiction is final.

A writ of error has been sued out from the Supreme Court of the United States to the Supreme Court of Texas.

The various statutes and constitutional provisions herein involved, set out in full in our brief, with references to the transcript, authorities and argument.

By Chapter 4 of Title 126 of the R. S. of Texas, a State Tax Board was created, of three persons, who are directed to ascertain the value of intangibles owned by railroads, and by a few other persons, and to distribute the values of railroad intangibles on a proportionate mileage basis, for taxation, to the various counties of the State.

II.

General Reasons Relied on for the Allowance of the Writ.

First Reason: It being shown, without contradiction, that 7 per cent. was a fair rate of interest in Texas, and that the net income of this railway for 1914, at that rate would capitalize only $934.361, and for 1913 only $16,523,727.40, and for 1912 only $29,743,564.28, and that the properties had been well managed for fourteen years, and that net average income during that time was .0425, on the Railroad Commission's valuation, and that 1912 was the best year in the history of the property, and that the State Railroad Commission's valuation of the physicals was $32,471,027.05, and betterments added since, making the aggregate valuation of the property of the railway on this basis, $34,013,092.07, and the aggregate of the stocks and bonds and lien obligations $32,154,000, and that the property had been foreclosed and sold out in 1910-11, wiping out $10,000,000 in stock, and $8,000,000 in debt, and that a new foreclosure had been entered on May 17, 1915, and that there was no basis whatever for finding that the non-divident paying foreclosed stock of $4,822,000 was worth, as found by the State Tax Board, $12,934,533, but the uncontradicted evidence showing it to be worthless, and that the State Tax Board had revalued tangibles, disguised as intangibles (as was plead and admitted by the Board), although valued, equalized and taxed by local authority, and the Court of Civil Appeals having found all of these facts, and finding no legal basis whatever for the action of the State Tax Board, and that the Board following formulas committed gross error; and the Court of Civil Appeals having correctly found that all of these matters were shown in evidence,

and the Constitution of Texas providing for the fair and equal valuation of all property for ad valorem taxation, and securing, by its Bill of Rights, equality before the law and due process of law (Art. 1, Art. VIII, Sec. 19, Art. 1), the Supreme Court of Texas erred in affirming the action of the State Tax Board, and its finding without evidence, and in setting aside, the decree of the Court of Civil Appeals, which nullified the action of the State Tax Board, and thereby the Supreme Court and the State Tax Board violated the first section of the Fourteenth Amendment to the Constitution of the United States, as well as Section 1 of Art. 8, and Section 19 of the Bill of Rights of the Constitution of Texas.

Second Reason: A wrong method was used, as appears by the below formulas denounced by the Court of Civil Appeals, as having no relation to the matter except to bring about a wrong and purely arbitrary result, and by which formulas it was produced that this railway owned intangibles in the amount of $10,743,223.00, said formulas being found by the Court of Civil Appeals, as is apparent on their face, to necessarily lead to a wrong result.

The formulas are as follows:

"INTERNATIONAL & GREAT NORTHERN R'Y CO.

Gross Receipts, 1911	$ 9,782,165	
1912	11,254,327	
1913	10,902,041	
1914	9,645,785	
Total		$41,584,318
$41,584,318÷4=		10,386,079
Capital stock issued and outstanding	$ 4,822,000	
Mortgage debt at p ar	26,181,500	
Total capitalization		$31,003,500
$10,396,079÷$31,003,500=33.53 ratio		
12.50 "	T. & P. (=Texas & Pacific R'y)	
33.53÷12.50= 268.24		
$4,822,000×268.24	$12,934,533	
Mortgage debt at par	26,181,500	
True value		$39,116,033
Physical value (assessed value)		28,372,810
Intangible value		$10,743,223"

(R., 7 and 8.)

TEXAS & PACIFIC FORMULAS INVOLVED IN ABOVE.

Gross Receipts	1911	$11,079,618	
	1912	12,341,684	
	1913	12,381,305	
	1914	11,745,562	
Total			$47,548,169
$47,548,169÷4=			$11,887,042
Stock issued and outstanding		$38,763,810	
Bonded Debt:			
1st Mortg. (Par)	$24,992,975		
1st Mortg. (Par)	4,870,000		
2nd Mortg. (Par)	24,987,036		
	$54,950,011		
Secured Int. accrued	1,498,500		
Total		$56,488,511	
		56,488,511	
Total capitalization			95,212,321
$11,887,042÷$95,212,321=12.48 ratio			
$38,763,810×12.50—Val. Stk		$ 4,845,476	
Lien obligations		56,448,511	
True value, Texas share—$61,293,987×57.60			$35,305,336
Physical value			15,588,147
Intangible value			$19,717,189"

As found by the Court of Civil Appeals, there was no evidence, outside of the formulas, except that the Board had valued tangibles under the form of intangibles, although valued and placed on the tax rolls by the county authorities, as provided by law; whereby inequality and violation of due process of law results in conflict with Section 1, Art. VIII, and Sec. 19, Art. 1, of the Constitution of Texas, and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States.

Third Reason: It violates the First Section of the Fourteenth Amendment to the Constitution of the United States for an authority, valuing property for taxation, to value the same in gross error, as against all evidence, or on wrong theory, although there may be no wrong intention; yet, in this case it was proved without contradiction in the evidence that the State Tax Board, as found by the Court of Civil Appeals, did "arbirtrarily" and against all evidence, make the valuation made of a premium of $8,112,000 on stock of par $4,822,000, already foreclosed and worthless, and which had never paid a dividend, except on a small portion thereof for one year; and that the State Tax Board did have a wrong volition and purpose, to wit, to find that plaintiffs had property which they did not have, in order to collect taxes out of property which they did have; wherefore such conscious wrong and fraudulent purpose is also a ground for setting aside their finding, because, if it be not done, the first section of the Fourteenth Amendment to the Constitution of the United States is violated, as well as the Constitution of Texas, and the first section of the eighth Article thereof.

It being proved and admitted that the formulas did

constitute the bases for the finding of intangibles in the amount of $10,743,223, and the formulas being upon their face unrelated to the subject matter and necessarily producing grossly wrong results as found by the Court of Civil Appeals, by this action, Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 1 of Article 8 of the Constitution of Texas, were violated.

Fourth Reason: When by false theory, as is in this case, by use of false formulas, as found by the Court of Civil Appeals, a wrong and excessive valuation is arrived at, then such valuation cannot stand, for it shows the systematic taking of property without due process of law, and inequality before the law, and violation of due process of law, secured by the First Section of the Fourteenth Amendment to the Constitution of the United States.

Fifth Reason: It is violative of the due process of law and equality before the law, secured by the First Section of the Fourteenth Amendment to the Constitution of the United States, for a State valuing authority to value property for ad valorem taxation, by gross error, and wrong theory, as in this case, even though there was no intention to violate the rights of the tax payers and to find values for taxation through such processes.

Sixth Reason. To uphold such bases of taxation is mere confiscation, and violative of the provision for due process of law and equality before the law, guaranteed in Section 1 of the Fourteenth Amendment to the Constitution of the United States, and by Section 1 of Art. VIII, and Section 19 of the Bill of Rights of the Constitution of Texas.

Seventh Reason: It being shown on the trial of the case, that a great number of the railroads of Texas, as to their intangibles, had been valued in 1915, by the application of said formulas, and that such applications necessarily brought about the most uneven results, and the Court of Civil Appeals having found, without any conflict in the evidence, that such uneven results necessarily followed, the action of the State Tax Board, upheld by the Supreme Court of Texas, violated the First Section of the Fourteenth Amendment to the Constitution of the United States, in that from such process, systematically pursued, there necessarily resulted, as between different railroads, erratic and unequal results, all as found by the Court of Civil Appeals, and in violation of the equality of valuation guaranteed by the First Section of Art. 8 of the State Constitution.

Eighth Reason: It was shown without contradiction, and found by the Court of Civil Appeals, that not only did the State Tax Board have before it no evidence that there were intangibles, but that it was completely shown by all the evidence that there were no intangibles. It is now contended that there were no intangibles whatsoever, but if there were any, which is not admitted but denied, then there were not intangibles in any amount approaching $10,743,223, as found by the State Tax Board; and in this case the plaintiffs having prayed that, if there were intangibles in a smaller amount than found by the State Tax Board, then that they should be justly ascertained, and the Court of Civil Appeals having found that there were no tangibles, and the Supreme Court of Texas having affirmed against all the evidence that there were intangibles in the amount found by the State Tax Board,

such finding violates the First Section of the Fourteenth Amendment to the Constitution of the United States and the First Section of Art. VIII, and Section 19 of Art. I.

Ninth Reason: It is fraud in law, and a violation of the First Section of the Fourteenth Amendment to the Constitution of the United States, for the State Tax Board, as they did in this case, to refuse at the hearing to state what bases they had for their finding, except the formulas, all as found by the Court of Civil Appeals, and as shown without contradiction in the evidence.

Tenth Reason: The First Section of the Fourteenth Amendment to the Constitution of the United States is violated when, as in this case, contrary to Sections 1, 8 and 18 of Article 8 of the Constitution of Texas, providing for the local valuation by county authorities of railroad and other tangibles, and their local equalization; the State Tax Board, upheld by the Supreme Court of Texas, and condemned by the Court of Civil Appeals, construed Chapter 4 of Article 126 of the Rev. Stat. of Texas to authorize it to value tangibles under the form of intangibles, and to bring up the value of tangibles of this railway under such disguise, and to treat the word "intangibles" in the statute as an "arbitrary, in violation of the provisions of the Constitution of Texas for the valuation of tangibles by the county authorities, and their equalization with the property of other taxpayers, and the requirement that taxes on tangibles should be paid in the county where they lie; with the result that the tangibles of this railway have been, to an extent, valued twice, to wit, by the county authorities as provided by law, and also by the State Tax Board, and distributed

for taxation twice, and under the form of intangibles to be taxed in counties where they do not exist, as well as to be taxed under the form of tangibles in counties where they do exist, on the valuations and equalizations made by the county board; whereby on this construction of the statute (condemned as unconstitutional by the Court of Civil Appeals in this case, but unheld by the Supreme Court of Texas, by affirming the State Tax Board), such statute and action of the State Tax Board thereunder is unconstitutional and in violation of the first section of the Fourteenth Amendment to the Constitution of the United States.

Eleventh Reason: The Supreme Court of Texas erred in not sustaining the contention of petitioners that the intangible tax statute of Texas (Chapter 4, Title 126 of rev. statutes) is unconstitutional, and in confliet with the first section of the Fourteenth Amendment to the Constitution of the United States, and in refusing to hold void the action of the Board thereunder, in that this section preserves the guaranties of the State Constitution for equality before the law and due process of law (Sect. 1, Art. VIII, and Sect. 19 of the Bill of Rights), and of its own strength furnishes these guaranties; because the Intangible Tax Statute provides that an independent board should find these intangible values of railroad and a few others, and the values of all tax payers shall be found by county boards, and equalized by county boards, and in that, there is a prohibition of equalization of intangible valuations; whereby the equality and due process secured by the Constitution of Texas and preserved by the first section of the Fourteenth Amendment to the Constitution of the United States, is violated, and becomes unenforcible.

Twelfth Reason: The Supreme Court of Texas erred in not holding the intangible tax statute of Texas (Chapter 4, Title 126, Revised Statute of Texas) unconstitutional and void, and in conflict with the equality and due process provisions in the Constitution of Texas (Sect. 1, Art. VIII, Sect. 19, Bill of Rights), and as preserved in the first section of the Fourteenth Amendment to the Constitution of the United States; because such intangible tax statute provides that it shall include in its operation, only incorporated railroads, ferry, bridge, turn-pike and toll companies, and all other persons doing business of the same character; omitting all other persons, including sleeping car, interurban and street car companies; whereby, as all equalization is prohibited under said statute, the persons included in the statute are subject to a higher rate of taxation and inequality, not provided for in the case of other persons, all as appears from Articles 7414, 7422, and 7423 of the Revised Statutes of Texas and Chapter 4, Title 126, thereof.

Thirteenth Reason: The Supreme Court of Texas erred in refusing to find that, if there were intangibles (which is denied), the petitioners were entitled to equalization thereof, under Section 1 of Art. 8 of the Constitution of Texas, and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, with the valuation placed on the property of other persons, it being proved without dispute that the property of other persons had been enormously undervalued, and petitioners being given no equalization down to such under-valuation, and being denied such parity.

Fourteenth Reason: The Supreme Court of Texas erred, in conflict with the first section of the Fourteenth

Amendment to the Constitution of the United States, and as securing the equality of valuation for advalorem taxation provided by the first section of Art. 8 of the Constitution of Texas, and the due process of law, secured by Section 19 of the Bill of Rights thereof, in that it denied such equalization downward to the average of the undervaluation and no valuations of other tax payers, on the ground that petitioner's physicals in Harris County, Texas, had been undervalued below the average of other persons, there being no evidence that plaintiff's physicals were valued below parity, and the court erred also, because under the ruling of the court, unholding the act of the State Tex Board in distributing physicals to various counties for taxation therein, though they did not exist therein, a question also arose of equalization in other counties, it being judicially known to the court, as well as affirmatively proved, without contradiction, that plaintiffs' physicals, in all of said counties, had been valued higher than the physicals and property of other tax payers, and that this was done not here and there, or accidentally, but on a system.

Fifteenth Reason: The Supreme Court of Texas erred in upholding the action of the trial court in admitting in evidence, over objection, the testimony as to the value of plaintiffs' physicals in Harris County, on the basis of value of abutting properties, and on the basis of reconstruction cost, over the objection that the only basis for valuation for advalorem taxation was the value of the property for railroad use, whereby, on this theory of the evidence, plaintiffs' property is valued and taken for taxation on a basis of availability for use, which does not exist, thereby resulting in the taking of property without

due process of law, and in violation of equality before the law, secured by Section 1, of the Fourteenth Amendment to the Constitution of the United States, all as has been settled by this court.

Sixteenth Reason: The trial court held, affirmed by the Supreme Court, that plaintiffs were not entitled to equalization down to parity of valuation, and of no valuation, of other tax payers, because as found by him the plaintiffs were estopped, in that, as found, none of its physicals had been valued below parity, and the trial court not making a deduction of such additional valuation of physicals, from the total value of the railway, as required by the Intangible Tax Statute, whereby the amount of intangible values found by the Board was not diminished, and to an extent property is twice valued for taxation, and this action being affirmed by the Supreme Court, Section 1 of Art. VII and Section 19, of the Bill of Rights of the Constitution of Texas and Section 1 of the Fourteenth Amendment to the Constitution of the United States, are violated.

Seventeenth Reason: The Supreme Court of Texas is prohibited by the State Constitution, and the statute pursuant thereto, from reviewing the findings of fact by the Intermediate Court of Appeals, "provided that the decisions of said court (Intermediate Court of Civil Appeals) shall be conclusive on all questions of fact brought before them on appeal of error." (Constitution of Texas, Art. 6, Sec. 6.)

The statute provides:

"The judgments of the Court of Civil Appeals shall be 'conclusive in all cases on the facts of the case.' " (R. S. of Texas, Sec. 15 90.)

The Court of Civil Appeals found that the action of the Board was induced by wrong formulas, absolutely unsupported in the evidence, and that the evidence showed without contradiction that there were no intangibles, and the court made that finding of fact. The construction of the Supreme Court of Texas, of the Constitution and statute is, that when the Courts of Civil Appeals reverse and render the trial courts, on the ground that there is no evidence, and there is evidence, then that a point of law is presented within the jurisdiction of the Supreme Court to reverse the case for a new trial, but not within its jurisdiction to reverse and render the case; whereby without due process of law, and without jurisdiction, the Supreme Court has rendered a decree, which it has no power to render, in conflict with the first section of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, upon all of the above, petitioners respectfully pray the court to grant them a Writ of Certiorari to the Supreme Court of Texas, to review its decision in this case, in order that justice may be done, and the law administered, and the manifest errors committed by that court, corrected, being committed in conflict with the express decisions of this court, in violation of the Constitution of the United States, or authority under them, and in deprivation of petitioners' rights, privileges and immunities thereunder, specially set up and plead in this case, all as appears above, all of which are set out above, and have been pursued throughout this case.

Your petitioners pray that all such other relief be granted them as may be their due.

Respectfully,

DABNEY & KING,

SAM'L B. DABNEY,

Attorneys and Solicitors for Petitioners.

SAM'L B. DABNEY,

Counsel.

FILED
OCT 3 1921
JAMES D. MAHER,
CLERK

No. [redacted]12

(A Writ of Error has been granted in this case.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

JAMES A. BAKER, RECEIVER OF THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, ET AL., PETITIONERS,

vs.

KARL L. DRUSEDOW, TAX COLLECTOR, ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

DABNEY & KING,
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SAMUEL B. DABNEY, *Counsel.*

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INDEX AND LIST OF CASES

INDEX

	Page
Note explaining that a Writ of Error has been granted in this case, and suggestion that application for certiorari be taken on submission of Writ of Error	1- 2
Abbreviations	2
Abstract and statement of case and questions involved and manner in which they were raised	2–13
Issues as stated by Court of Appeals deciding case in favor of Petitioners	4 –5
Findings of law and fact by the Court of Appeals in favor of Petitioners	6–10
Findings of Supreme Court of Texas adverse to Petitioners	10–11
Positions taken on motion for rehearing in Supreme Court of Texas and there overruled below stated	11–13
General reasons relied on for allowance of this writ, and specifications of error	14–21
Mere confiscation to find intangibles based on finding that $4,822,000, par of non-dividend paying, foreclosed stock, was worth as found by the Tax Board, $12,934,-533, and to find that there were intangibles on this basis and to ignore all evidence that there were none as found by the Court of Civil Appeals	14
Wrong methods and formulas were used	14–15
Fourteenth Amendment violated by valuing property for taxation against all evidence on wrong theory	15
Wrong and excessive valuations can not stand on wrong theory	16
Though there should be no wrong intention, gross error shown and mere confiscation and violation of the quality guaranty	16
It being shown without contradiction and found by Court of Civil Appeals that there were no intangibles, to find intangibles of $10,743,233, unconstitutional	16–17
The Tax Board had no power to find intangibles under the guise of tangibles and distribute them for tangibles, since this valuation of tangibles and taxation thereof was lodged in the county authorities, and this is discriminatory and double taxation	18
The Intangible Tax Statute of Texas unconstitutional	18–19

Page

If there were intangibles Petitioners entitled to equalization thereof 19–20

Unconstitutional to value tangibles of Ry. for taxation on basis of valuations of abutting property 20

Double taxation involved in finding greater aggregate of tangibles and not deducting them from total valuation and in maintaining valuations found of intangibles 20–21

Supreme Court had no power to render this case against findings of fact of Court of Appeals and no jurisdiction to do so 21

Brief of Argument 22–69

Analysis and statement of salient undisputed facts and comment thereon 22–43

Statement of underlying facts proved without dispute and found by the Court of Civil Appeals 42–43

Argument upon the law 44–69

Statement of applicable provisions of the Constitution of Texas, as applied and protected and enforced in connection with the first section of the Fourteenth Amendment 44–45

Statement and set out of applicable provisions of the State Statutes governing intangibles taxation of railroads 45–50

Discussion of the application of the first section of the Fourteenth Amendment, in connection with the act and claim of Board sustained by the Supreme Court that tangibles of a railroad could be twice taxed and twice valued, the second time under the guise of intangibles, and so distributed for taxation in the counties where such tangibles were not, and the action of the State Tax Board, upheld by the Supreme Court, in secretly setting aside the findings of 37 assessors and 37 boards of equalization in 37 counties, valuing and equalizing tangibles, and definition of intangibles as fixed in Texas, in connection with the intangible tax statute 50–54

Wrong volition and fraudulent intent by State Tax Board ground of relief in connection with the first section of the Fourteenth Amendment 54–56

Wrong volition need not be proved, when as here (although there was wrong volition) the State Tax Board systematically used erroneous principles and formulas 56–58

No matter what the volition, a violation of the Fourteenth Amendment exists when the valuation is grossly excessive 58–59

Page

Methods of valuing for taxation explained 59–60

Double taxation to raise value of tangibles without lowering the value of intangibles, when the tangibles must be deducted from the unit value to find intangibles 61–62

Railroad property must be valued for taxation on basis of railroad use, not on basis of abutting property values 62–63

A valuation of that which does not exist to the extent valued unconstitutional 63–64

No ground for finding that tangibles were undervalued 64

Fourteenth Amendment violated by failure to enforce above principles 64–65

Fourteenth Amendment violated by the Supreme Court rendering this case, having no power or judisdiction to render the same 65–69

LIST OF CASES CITED

Bauman vs. Jaffrey 66
Board vs. C. B. & Q. Ry. 53
Central R. R. vs. Greene 65
C. C. S. L. Ry. vs. Backus 61–62
C. S. Ry. vs. Wright 61–62
Chicago Union Traction Co. vs. Board 59
Choate vs. Ry. 66
Coalter vs. Wiel 57
Cummings vs. Bank 8, 9, 53, 54, 56
Fargo vs. Hart 63
Galveston Co. vs. Galveston Gas Co. 63
German National Bank vs. Kimball 8, 9, 56
Greene vs. L. & N. R. R. 65
Guesti vs. Galveston Tribune 66
Ill. Central R. R. vs. Greene 65
Johnson vs. Holland 54, 57, 58
Lee vs. Ry. 66
Lively vs. M. K. & T. Ry. 54
L. & N. R. R. vs. Greene 65
M. K. & T. Ry. vs. Shannon 54, 61
Pollard vs. Ry. 66
Railroad and Tel. (cases) vs. Board 8, 53, 57, 59
R. R. vs. Backus 61–62
R. R. vs. Wright 61–62
Raymond vs. Traction Co. 54, 59
State Board vs. People ex rel. Goggin 54, 57, 58, 59
State of Texas vs. R. R. 61
Tainter vs. Lucas 58
Taylor vs. L. & N. R. R. 54, 56
Tweed vs. Tel. Co. 66
Trustees vs. Guenther 53
Union Traction Co. vs. Wright 65
U. S. vs. Walker 68
Windsor vs. McVeigh 63

(A Writ of Error has been granted in this case.)

IN THE

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JAMES A. BAKER, RECEIVER OF THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, ET AL., PETITIONERS,

vs.

KARL L. DRUESEDOW, TAX COLLECTOR, ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

NOTE.—This case is pending on a Writ of Error granted. The Court of Appeals of Texas found the tax levied to be unconstitutional and void. The Supreme Court of Texas reversed the Court of Appeals and held the tax to be valid. Some of the points are reviewable under one writ, some under the other. The large amount involved appears from the fact that the immediate case concerns the taxes collectible in a single county; this railway penetrating 37 counties and being 1,106 miles long. On this ground, and because of the importance of the questions, it is respectfully suggested

that the Petition for the Writ of Certiorari be taken with the submission of the case on Writ of Error; thereby economizing time and permitting the consideration on one hearing of points, which are interrelated and of great public importance. In all counties approximately $100,000 per annum is involved.

ABBREVIATIONS USED HEREIN:

Ry.=International and Great Northern Ry. Co.
Tax Board=the State Tax Board of Texas.
Receiver=James A. Baker, Receiver of the Ry.
Supreme Court=the Supreme Court of Texas.
Court of Appeals=the Court of Civil Appeals of the First Supreme Judicial District of Texas, being an intermediate court of review.
District Court=the District Court of Harris County, Texas, being the court of first instance.
Tr.=the Transcript of the Record.
References are to the paging at top.

I

CONCISE ABSTRACT AND STATEMENT OF THE CASE, AND OF QUESTIONS INVOLVED AND OF THE MANNER IN WHICH THEY WERE RAISED AND DECIDED.

The suit was filed in the District Court to restrain the collection of taxes by the Tax Collector and the members of the Commissioners' Court of

Harris County, Texas. On a mileage basis, of the total of intangibles, of $10,743,223.00; found by the the Ry. for 1915; $603,227.00 were apportioned to Harris County and there levied on at the rate of $1.095 per hundred, for State and County taxes, and $6,605.34 was claimed by the State and County, as payable to the Tax Collector of that county, for which he sued by cross action and recovered (Tr., 5, 6, Sec. 7, 59-62, and opinion of Court of Appeals, 400). On the same rate for all counties there would be claimed $117,638.39.

The suit was for a perpetual injunction on the claim that intangibles did not exist at all, that they were found in gross error, on a wrong theory and fraudulently, and that to the extent they may have existed (it being denied that they existed at all), the plaintiffs were entitled to an equalization of values with those systematically given to other taxpayers.

The defendants denied every contention and plead that the tangibles did exist as found by the Tax Board, and took the position that plaintiffs were estopped, and that the Tax Board had, under a correct construction of the intangible tax statute, rightly valued tangibles under the form of intangibles, and that this is what the intangibles tax statute meant, giving the Board the power to bring up what they considered to be the too low valuations of tangibles made by the various county authorities penetrated by the Ry. The contention being that the State Tax Board, although in the words of the statute given authority

only to value intangibles, had a right to treat the word "intangibles" as an "arbitrary," and thereunder value tangibles.

A full analysis of the issues is stated in the opinion of the Court of Appeals (Tr., 400-416), and abbreviated as follows:

1. It was contended that the Tax Board did not endeavor, in the words of the statute, to bring about "a just, fair, equitable, and careful valuation," but against all evidence, on a deliberated plan, supposed the existence of fictional intangibles, in order to collect out of the properties of the Ry. large taxes, under the security of tax liens and preferences, in gross error and against all evidence.

2. That there were no intangibles; but if any, not of the value of $10,743,223.00 as found.

3. That the Tax Board had concealed its processes and refused to state their bases, when demanded, except that on certain formulas they had valued the stock of the foreclosed and insolvent Ry. par, $4,822,000.00, at $12,934,533.00.

4. That at the hearing plaintiffs had shown, without contradiction, that there were no intangibles and that the Board had produced no evidence, except certain formulas, which necessarily led to a wrong result, the formulas involving wrong theories. A full hearing was had before the Board, the evidence taken down, and all introduced on trial.

5. That the formulas produced unequal results, between different railroads, and that tangible

property was not taxed at over 40-cent value, whereas this fictional property was proposed to be taxed at $10,743,223.00 as full value found by the Board.

6. That the Tax Board had acted fraudulently and with a deliberate intent to find values which did not exist, and which no reasonable mind could find.

7. That the Tax Board had valued tangibles under the form of intangibles, when they had no authority to value tangibles, which could be valued by the county boards alone, whereby there had resulted gross inequalities and discrimination, as to tangibles disguised under the form of intangibles and that the Board had refused to state at the hearing that this basis existed, but afterwards plead and testified that they so did, maintaining that they had a right to so do.

Plaintiffs relied throughout on the first section of the Fourteenth Amendment to the Constitution of the United States and similar provisions in the Constitution of Texas, and the provisions thereof guaranteeing equality of valuations for *ad valorem* taxation, all as protected by the Fourteenth Amendment. (Tr., 1-23, and opinion of the Court of Appeals, 400-415.)

The Court of Appeals found every issue of law and fact in favor of the plaintiffs, declared the valuation unconstitutional, and reversed and rendered the case for plaintiffs, except that it refused to hold the State statute creating the Tax Board

unconstitutional, and except that it did not reach the problem of equalization, having ruled that there were no intangibles. (Opinion, Tr., 400-416, Judgment, 416, and on motion for rehearing, 462, 5.)

The case can be most briefly stated by setting out the complete collision between the Court of Appeals and the Supreme Court.

The findings of law and fact of the Court of Appeals, in order as stated by that Court, are briefly summarized as follows (197 S. W., 1047, etc., and Tr., 400, etc.):

1. That at the hearing before the Tax Board plaintiffs showed that the valuation by the Texas Railroad Commission of the property plus unvalued betterments, was $34,013,092.07, and the aggregate of stock and lien obligations $32,154,000.00, that under the foreclosure of 1911 the property had been sold out, and capital stock of $10,000,000.00 and indebtedness of $8,000,000.00 eliminated, and a new company organized which went into the hands of Receivers in 1914 for default; that the properties had been well managed, but that for 14 years the average net income was only 4.25 per cent on the valuation of the Commission; that the net income for 1912, the best year in the history of the property, at 7 per cent would capitalize $29,743,564.28, for 1913; $16,523,727.43, and for 1914 $934,361.00. In this connection the Court found: "all of the facts stated above were shown in the trial in the court below by undisputed evidence." (Tr., 405-6.)

2. The formulas used by the Tax Board in finding intangibles were set out and discussed and the Court concluded: "Unless this process (the use of the formulas) can be held sufficient to show that the Ry. Co. has intangibles, upon which the assessment can be based, there is no evidence of such values." (Tr., 409, end of next to last paragraph.) The formulae were condemned and will be elucidated in the argument. The Court found "the formulae used by the Board could not possibly show the value of the Ry. stock nor in any way aid in ascertaining such values," and that they involved absolutely a wrong system, and that the "so-called Rule of Three formula applied by the Board to ascertain the value of the stock, can not be so applied upon any mathematical principle, or rational theory, and its general application produces unjust discrimination between railroads." (Tr., 411, below middle of page—406-11.)

3. The Court found: "There is no evidence upon which the value of the stock, fixed by the Board, can be maintained, and when called upon and urged by the Appellants, upon the hearing before it, to disclose what, if any evidence, or information it had, which tended to disprove the showing made by Appellants, that no such values existed, the Board only offered its Rule of Three formula." (Tr., 411, below middle of page.)

4. That the Board found arbitrarily, misconstruing the statute, as shown by their pleadings and testimony, and valuing the tangibles of the Ry. under he guise of intangibles, which could only be valued

by the County Boards, presumed to have valued by them on equality with other tangibles, and therefore the valuation was unconstitutional on this ground. (Tr., 411-2.)

5. That the acts of the Board were void and in conflict with the Constitutions of the United States and Texas:

BECAUSE, whether or not the Board had a wrong volition, it is sufficient that they deny Plaintiffs equality, guaranteed by the Constitutions of the State and Nation, citing Cummings *vs.* Bank, 11 Otto, 153; Railroad & Tel. Cos. *vs.* Board, 85 Fed., 305; German National Bank *vs.* Kimball, Collector, 13 Otto, 732, and other cases. (Tr., 412-13.)

BECAUSE, when a system of valuation is adopted so as to operate unequally, and to violate a fundamental principle (of the Constitution) then relief will be awarded, citing Cummings *vs.* Bank, 11 Otto, 153; R. R. & Tel. Cos. *vs.* Board, 85 Fed., 305; Bank *vs.* Kimball, 13 Otto, 733, and other cases (Tr., 412-13.)

BECAUSE the State Statutes, as construed and acted upon by the Board, whereby they valued the locally valued tangibles again, under the guise of intangibles, was contrary to the State and Federal Constitutions, distributed values of tangibles for taxation into counties where they did not exist, and involved inequality and injurious discrimination against a class of persons (railroads), and a class of (their) property, citing Bank *vs.* Kimball, 13 Otto, 732; R. R. & Tel. Cases *vs.* Board, 85 Fed., 305, and other cases. (Tr., 413, 411-12.)

BECAUSE, though the Statute was held constitutional, and merely to have been unconstitutionally construed and acted upon by the Board, nevertheless when the members of the Board combined together, as they did in this case, "and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the Court will give relief," quoting Bank *vs.* Kimball, 13 Otto, 732, and citing other cases. (Tr., 413.)

BECAUSE, the Tax Board, "arbitrarily fixing values of intangible property, which did not in fact exist," it followed relief must be awarded. Citing Cummings *vs.* Bank, 11 Otto, 153, and other cases. (Tr., 412, 414.)

On the Motion for Rehearing the Court of Appeals further found:

1. That the evidence conclusively showed that the Tax Board relied exclusively on the formulas condemned as necessarily bringing wrong results and involving wrong principles; that the State Tax Commissioner, a member of the Board testified that the Board so did: "Yes, sir; we did on the formula and stuck to the formula." (Tr., 463.)

2. That the values, found by the State Railroad Commission of Texas were shown by the undisputed evidence, to be less than the values of the tangible property (Tr., 463); to wit: $32,471,-027.05, plus unvalued betterments $1,542,065.00. That the great preponderance of the evidence showed that the tangible values were largely in

excess of the amount fixed by the Commission. (Tr., 405-6.)

3. That the valuation could only be sustained on the theory that the tangibles having been valued once as tangibles could be valued and taxed again as intangibles, or that the Board could make an "arbitrary" finding of intangible values, as contended by the defendants; but the Court found: "We can not adopt either of these theories of Appellees, and feel constrained to adhere to the conclusions stated in our main opinion." (Tr., 463, near bottom.)

On Writ of Error the Supreme Court referred the case to one of its Commissions, and adopted the opinion of Commissioner Spencer, and reversed the Court of Appeals and affirmed the Trial Court. (Tr., 541-49.)

That Court found:

1. That the intangible tax statute of Texas was constitutional. (Tr., 543 and 7.)

2. That there was no evidence that the Board acted in bad faith or arbitrarily or fraudulently or ultimately relied on the formula. (Tr., 544.)

3. That there was no right to equalize the valuation of intangibles with valuations of other property, because, as found, the tangibles of the Ry. had been undervalued. (Tr., 547-8.)

4. That the construction of the Tax Board, that the Intangible Tax Act of Texas authorized them to value tangibles as intangibles although tangibles were valued again for taxation by the County Boards, and that the word "intangible" was an

"arbitrary," and that the Board had the power to again value and have taxed under the guise of intangibles, tangibles valued by the County Board and have them placed upon the rolls for taxation, was upheld, and assumed to be not violative of the State and Federal Constitutions. (Op. Tr., 541, etc.). This was assumed in the general conclusion affirming the Tax Board. Every position taken by the Plaintiffs and Court of Appeals was overruled.

A Motion for a Rehearing was made, in which the points found by the Court of Civil Appeals were reaffirmed and the errors of Commissioner Spencer's opinion set out, each point being supported by uncontradicted evidence and summarily stated as follows:

1. Error to support the action of Tax Board, in construing the statute to authorize valuation for taxation of tangibles under form of intangibles; tangibles being also valued by the county authorities, and error in upholding the action of the Board on this construction. (Tr., 550-551, points 1 and 2.) It was set out there was no conflict in the evidence, that this had been done, and that the property had been twice valued for taxation. (Tr., 550-553, 568, points I, VIII and XVI.)

2. Error in reversing and rendering case on issues of fact; since, if there was a conflict of evidence, or no evidence, the Supreme Court could only reverse the Court of Appeals on fact issues, not render, the State Constitution giving it no jurisdiction. (Tr., 550-563-4, points, I, III, VII, VIII, X.)

3. Error in finding that there were intangibles, in amount of $10,743,233.00 as found by the Board, in conflict with the findings of the Court of Appeals that there were none, and no evidence to show any, but that it was completely shown that there were none, whereby Plaintiffs' property was to be taken without due process of law and arbitrarily. (Tr., 562-3, points V and VII.)

4. Error in finding that it was not shown that the Tax Board ultimately based its valuation on the formulas, which were proved to contain a wrong theory, it being admitted by the Board that it was based on the formulas. (Tr., 562-3, points I and V.)

5. Error in refusing to sustain the position that values of intangibles, as found by the Tax Board, could not be maintained; when, at the same time, values of tangibles were increased; it being double taxation to increase values of tangibles, and not decrease value of intangibles, the total value found by the Board remaining unchanged. (Tr., 564, point XI, point XIC.)

6. Error in sustaining testimony as to railroad tangible values for taxation, based on values of abutting property. (Tr., 564, point XIa.)

7. Error in holding tangibles in Harris County were assessed below parity. (Tr., 564, point XIb.)

8. Error in refusing to find that no valuation, made on a wrong volition, as completely proved, can be sustained. (Tr., 566, point XII.)

9. Error in refusing to find that it is legal fraud, and violative of due process of law, to grossly over-

value property, against all evidence, or its overwhelming weight. (Tr., 563, point XIII.)

10. Error in refusing to find that a grossly excessive valuation involves taking property without due process of law. (Tr., 567, point XIV.)

11. Error in refusing to rule that it violates due process of law to value property on a wrong system. (Tr., 567, point XIV.)

12. Error in refusing to find it legal fraud for the Board to refuse to state the bases of valuation. (Tr., 567, point XV.)

13. Error in refusing to find that Ry. property must be valued for taxation as impressed with railroad uses. (Tr., 568, point XVIII.)

The motion for rehearing was overruled May 25, 1921. (Tr., 575.)

Pending the course of the case after appeal, Dillingham, one surety on the appeal bond, died, and his executors are made parties hereto. The county officers, originally defendants, went out of office, with one exception. Their successors are made additional parties. One of the two Receivers, plaintiffs, died, and his co-Receiver was made sole Receiver, James A. Baker. All as shown by decrees of Probate, Dillingham's will, orders in receivership and the results of elections (Tr., 575-589.) Under the Texas practice no changes are recognized pending appeal or Writ of Error. The Ry. was and is a party.

II

General Reasons Relied on for the Allowance of This Writ and Specifications of Error.

These reasons are abbreviated from our Petition:

1. It being shown without contradiction that there had been foreclosures and elimination of immense values, as represented in stocks and bonds, and that there was no basis whatever for finding that the non-dividend paying foreclosed stock of $4,822,000.00 was worth, as found by the Tax Board, $12,934,533.00, or a premium of over-$8,000,000, and the uncontradicted evidence showing it to be worthless, and that the State Tax Board had merely valued tangibles, valued and equalized by the County Boards, in the form of intangibles, and the Court of Civil Appeals having found that there was no basis whatever, that all facts claimed by the plaintiffs had been proved before the Board at a hearing, and also proved again in Court, there was no ground on which to affirm the Trial Court and reverse the Court of Civil Appeals, but this was mere confiscation and taking of property without due process of law in violation of the first section of the Fourteenth Amendment and Section 19 of the Bill of Rights of Texas, and Section 1, Article VIII of its Constitution (Pet., pp. 7, 8, 1st Reason).

2. A wrong method being used, to wit: The formulas which had no relation whatsoever to any

right process, and which no intelligent mind could follow, and the evidence showing that the Board had stuck to these formulas, which are set out in our argument, and in the Petition for this Writ, and that the formulae were a basis and the sole basis for finding $10,743,223.00 intangibles; to follow the formulas is to follow a wrong method, and involves a conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Sections 1 and 19 of Articles 8 and 1 of the Constitution of Texas. (Pet., pages 8-10, Second Reason.)

3. It violates the first section of the Fourteenth Amendment to the Constitution of the United States to value property for taxation in gross error against all evidence or on wrong theory, although there be no wrong intention. The Court of Civil Appeals having found without contradiction in the evidence that the Tax Board did arbitrarily and against all evidence make the finding of intangibles of $10,743,223.00, by valuing foreclosed and worthless stock par $4,822,000.00 at a premium of $8,112,000.00, and it being shown that the State Tax Board did have a wrong volition and purpose to find that plaintiffs had property which they did not have, in order to collect taxes out of property which they did have, and it being proved and admitted that the finding was based on the formulas which no logical mind could follow, and which necessarily brought about a wrong result. (Pet., pp. 10, 11, Third Reason.)

4. No valuation can stand based on a wrong theory, reaching a wrong and excessive valuation, for this involves taking property without due process of law in violation of the first section of the Fourteenth Amendment to the Constitution of the United States. (Pet., p. 11, Fourth Reason.)

5. Even though there is no intention to violate the rights of the taxpayer he is entitled to relief when, as in this case, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States his property is valued for taxation in a gross error and as a wrong theory. (Pet., p. 11, Fifth Reason.)

6. To uphold such bases of taxation as were shown in this case, is mere confiscation, in violation of the due process of law and the equality provisions guaranteed by the Constitution of Texas and of the Fourteenth Amendment to the Constitution of the United States. (Pet., p. 11, Sixth Reason.)

7. It being shown without contradiction that a great number of the railroads of Texas had their alleged intangibles valued by the application of the formulas, and it being shown that such formulae necessarily brought about inequality and discriminatory results, thereby the equality guaranteed by the State Constitution and the Fourteenth Amendment of the United States was violated. (Pet., p. 12, Seventh Reason.)

8. It being shown without contradiction and found by the Court of Civil Appeals that it was

completely shown to the State Tax Board that there were no intangibles and on trial that there were none, and it being now contended, as then, that if there were any (which is not admitted but denied), then there were no intangibles in the amount approaching $10,743,223.00 as found, which amount was shown to be error and contrary to every finding, which any fair and sedate mind could reach; in sustaining this finding, the Supreme Court has violated the first section of the Fourteenth Amendment of the Constitution of the United States of its own strength, and as protecting first section of Article 8 and Section 19 of Article 1 of the Constitution of the State of Texas, providing for equality of valuations and due process of law. (Pet., pp. 12, 13, Eighth Reason.)

9. It is fraud in law and a violation of the first section of the Fourteenth Amendment for taxing authorities to refuse to state at a hearing given by law what their bases are, as was done in this case. (Pet., p. 13, Ninth Reason.)

10. The first section of the Fourteenth Amendment of the Constitution of the United States is violated when, as in this case, contrary to Sections 1, 8 and 18 of Article 8 of the Constitution of Texas, providing for the local valuation by county authorities of railroad and other tangibles and their local equalization, the Tax Board upheld by the Supreme Court of Texas and condemned by the Court of Civil Appeals, construed Chapter 4 of Title 126 of the R. S. of Texas, to authorize it to

value tangibles, under the form of intangibles, and to treat the word "intangibles" in the statute as an "arbitrary," in violation of the provisions of the Constitution of Texas for valuation and equalization of tangibles by county authorities, and the requirement that taxes on tangibles should be paid in the county where they lie; with the result that the tangibles of this railway have been, to an extent, valued twice, to wit: by the county authorities as provided by law and also by the Tax Board and distributed for taxes twice, and under the form of intangibles to be taxed in counties where they do not exist as well as to be taxed, under the form of tangibles, in counties where they do exist, on the valuations and equalizations made by the County Boards; whereby such action of the State Tax Board is unconstitutional and violates the first section of the Fourteenth Amendment to the Constitution of the United States, and, furthermore, this action of the Tax Board violated the Fourteenth Amendment and brought about inequality, and was void without regard to the laws of Texas. (Pet., pp. 13-14, Tenth Reason.)

11. The Supreme Court erred in not sustaining the contention that the intangible tax statute is unconstitutional and in conflict with the first section of the Fourteenth Amendment to the Constitution of the United States, and in refusing to hold acts of the Board thereunder on this ground to be void, in that this section preserves the guaranties of the State Constitution for equality before the law and due process of law, as contained in Section

1, Article 8 and Section 9, Article 1, thereof; and in that, of its own strength it does furnish these guaranties; because the Intangible Tax Statute provides that an Independent Board should find intangible values of all the railroads in Texas and of a few others; the values of all others to be found by the County Boards, and equalized by County Boards and because the intangible tax statute prohibits equalization of intangible valuations; whereby the equality and due process provisions are violated. (Pet., p. 14, Eleventh Reason.)

12. The Supreme Court erred in not holding said statute unconstitutional and in conflict with the equality and due process provisions of the State Constitution, as preserved in the first section of the Fourteenth Amendment, because such Intangible tax statute provides that it shall include in its operation only incorporated railroads, ferry bridges, turnpikes and toll companies, and all other persons doing business of the same character, omitting all others. (Pet., pp. 14, 15, Twelfth Reason.)

13. The Supreme Court erred in refusing to find that if there were intangibles, petitioners were entitled to equalization under the provisions of Section 1 of Article 8 of the Constitution of Texas and Section 1 of the Fourteenth Amendment to the Constitution of the United States, it being proved without dispute that the property of other persons had been enormously undervalued. (Pet., p. 15, Thirteenth Reason.)

14. The Supreme Court erred, in conflict with the

first section of the Fourteenth Amendment, securing the provisions of the Constitution of Texas for equality of valuation, in that it denied equalization downward to the average of undervaluations and no valuations of other taxpayers, on the ground that Petitioners' physicals in Harris County had been undervalued, there being no evidence that these physicals had been valued below parity, and the State Tax Board, distributing Plaintiff's physicals (under the guise of intangibles) to other counties, as to which other counties no attempt was made to show that the Ry.'s property had been undervalued. (Pet., p. 15, Fourteenth Reason.)

15. The Supreme Court erred in not ruling that there was error in admitting in evidence values based on abutting property of physical properties in Harris County, instead of holding that a railroad's property should be valued for taxation only on the basis of railroad uses, in conflict with the first section of the Fourteenth Amendment of the Constitution of the United States. (Pet. 16, Fifteenth Reason.)

16. The Supreme Court erred, in upholding the Trial Court in finding Plaintiffs estopped against equalization, if there were intangibles, on the ground that tangibles of Petitioners had been undervalued in Harris County. The Trial Court and Supreme Court maintaining the aggregate values of the Tax Board and increasing physical values in Harris County, without deducting them from such aggregate, and thereby diminishing the

amount of intangibles, in conflict with Section 1, of Article 8, and Section 19 of Article 1 of the Constitution of Texas, and Section I of the Fourteenth Amendment to the Constitution of the United States. (Pet. 17, Sixteenth Reason.)

17. The Supreme Court erred in reversing and rendering this case, undertaking to reverse and render the Court of Civil Appeals on findings of fact, which findings of fact are made absolute and final by the Constitution of Texas as follows: "Provided that the decisions of said court (Intermediate Court of Civil Appeals) shall be conclusive on all questions of fact brought before them on appeal or error" (Article 6, Section 6), and in conflict with the statute of Texas, providing that the judgments of the Court of Civil Appeals shall be conclusive on the facts of the case (R. S., Section 150). The Court of Civil Appeals having found that this was no evidence whatsoever to sustain the finding, and that the finding was based solely on erroneous formulas, all as contradicted by the Supreme Court; and the Supreme Court having power only to reverse and not to render when there was no evidence, whereby, in taking jurisdiction to reverse and render this case, the Court has violated Section I of the Fourteenth Amendment to the Constitution of the United States.

III

Brief of the Argument

We will first state the salient facts, showing that they were proved without dispute. They are our minor premise. Next we will proceed to the argument of applicable law and state the various major premises; that is the legal propositions upon which we rely in argument.

On the facts we will comment.

On the trial a transcript of the evidence given before the State Tax Board was introduced. (Tr., 149-173.) The applicable portions of the Tax Statute, constituting that Board with authority to find the intangibles of railroads and a few others for the whole State, and to apportion these on a mileage basis among the respective counties penetrated by each railroad, will be set out. When apportioned, the State and County levies were applied thereto, the Statute prohibiting any equalization of the amounts so apportioned, so as to bring them to a parity of valuations with the property of other taxpayers in the various counties, although the State Constitution absolutely required this to be done as we will show. A full exposition and the principal points in evidence were given to the State Tax Board at a formal hearing held by it. The statute required that Board to make a preliminary valuation, serve it upon the railroads, and then that the railroads should show cause at this hearing, if they desired, why such valuations should not be sustained. The

Tax Board made a preliminary finding that this Ry. had intangibles in amount $13,493,200, but thereafter withdrew that finding and before the hearing changed it to $10,743,223. (Tr. 144.)

This finding was adhered to by the Board throughout and is the one now attacked. The whole transcript of the evidence introduced before the Board was again introduced upon the trial of the case, with a view of showing that the Board had full data and refused to follow the light. (Tr. 149-174.)

The I. and G. N. Ry. formula and the T. and P. Ry. formula, were as follows:

"INTERNATIONAL & GREAT NORTHERN R'Y CO.

Gross Receipts, 1911	$ 9,782,165	
1912	11,254,327	
1913	10,902,041	
1914	9,645,785	
Total		$41,584,318
$41,584,318÷4=		10,386,079
Capital stock issued and outstanding	$ 4,822,000	
Mortgage debt at par	26,181,500	
Total capitalization		$31,003,500
$10,396,079÷$31,003,500=33.53 ratio		
12.50 " T. & P. (=Texas & Pacific R'y)		
33.53÷12.50= 268.24		
$4,822,000×268.24	$12,934,533	
Mortgage debt at par	26,181,500	
True value		$39,116,033
Physical value (assessed value)		28,372,810
Intangible value		$10,743,223."

(R., 7 and 8.)

TEXAS & PACIFIC FORMULAS INVOLVED IN ABOVE.

Gross Receipts, 1911	$11,079,618	
1912	12,341,684	
1913	12,381,305	
1914	11,745,562	
Total		$47,548,169
$47,548,169÷4=		$11,887,042

Stock issued and outstanding		$38,763,810	
Bonded Debt:			
1st Mortg. (Par.)	$24,992,975		
1st Mortg. (Par.)	4,870,000		
2nd Mortg. (Par.)	24,987,036		
	$54,950,011		
Secured Int. accrued	1,498,500		
Total		$56,488,511	
		56,488,511	
Total capitalization			95,212,321
$11,887,042÷$95,212,321=12.48 ratio			
$38,763,810×12.50—Val. Stk		$ 4,845,476	
Lien obligations		56,448,511	
True value, Texas share—$61,293,987×57.60			$35,305,336
Physical value			15,588,147
Intangible value			$19,717,189"

[Tr., 114, 145, Op. Court of Appeals Tr., 406-7.]

The mileage and general situation of Texas railroads are all geographical facts of which the court takes knowledge. The above formulae were not applied to the Abilene & Southern, El Paso & Northern, and Rio Grande & Eagle Pass Railways (Tr. 23), but to all other roads on the same basis as this Ry., with some variations. (Formulae, results and intangibles found for 68 R. Rs., Tr. 115-149.) It will be observed, under the formulas, that the I. & G. N. stock par $4,922,000 was multiplied by 2.6824 and so raised to $12,934,543. This multiplier was arrived at by taking a ratio, so-called, of 3.353, derived from dividing the capital stock by the total capitalization, and dividing that ratio by the Texas & Pacific ratio similarly derived of 1.25, giving 2.6824 as a multiplier. The T. P. ratio went into the formulas of the other roads. Mr. Lefevre, an expert mathematician and recognized and com-

mended as such by the Court of Appeals in its opinion (Tr. 409-10) on trial showed that this process is equal to multiplying the average gross income of every road except the T. and P, by 8 and dividing the result so obtained by the total of the stocks and bonds; e. g., the average gross income of this Ry. for four years is stated to be $10,396,079, multiplied by 8 equals $83,168,832, divided by $31,350,000, aggregate of stock and bonds, we get 2.68, or the multiplier used by the Board. The Board puts its decimal marks in the wrong place, but does not so wrongly use them. Multiplying the par of the stock by 2.68, we get the Tax Board's value, $12,934,233.

Mr. Lefevre is also an efficiency expert and investigator of problems like this, and testified that this process had no relation to any search for a true result, was a mere rigmarole and necessarily led to a wrong result, all as is shown by the Court of Appeals in its opinion. (Tr. 381-83.) He stated that the use of the formulas was mathematically inconceivable, and had no relation to the solution of the problem, and "no foundation in reason, and not susceptible of being reasoned, except to be destroyed by the use of reason, and that if a man making these calculations had known what he was doing, his common sense would have revolted against doing it"; that the only way to reach intangibles was on the basis of net income, assuming that all the property was in action, and that on the figures stated the ratio of net income to capitalization would be .3353 and assuming that

the T. & P. Ry. had a ratio of .125 between gross income and capitalization, that it did not follow as supposed that this Rys. stock was worth more than twice as much as the T. & P., and that it would be absurd to suppose, on these formulas that it was worth 8 times as much, and that the formulas adopted would necessarily produce the widest variations between different roads and was "just a rigmarole of calculation which had no bearing." (Tr. 381-3.)

The Court of Appeals found that the application of the formulas produced the widest discrimination among the railroads. (Tr. 410.)

The formulae and findings of the State Tax Board, as to intangibles of other Texas railroads, were introduced—68 roads. (Tr. 115-149.)

These formulae produced the most erratic results, and, as shown by Mr. Lefevre, the greatest inequalities, but were largely in their results adhered to and intangibles found thereon. Compare the result between the T. & P. and the I. & G. N. Why should the multiplier of 2.6824 be applied to the I. & N. G. stock and the multiplier of 1.25 be applied to the T. & P. stock? In a few instances only did the State Tax Board depart from its formulas, but favored enormously some railways and enormously injured others by the application. The decimal points are mixed up in the formulas, but used as above.

In the hearing before the State Tax Board it was proven that the Ry. had gone into receivership in August, 114, having been sold out

and a prior receivership closed in 1911; that there were only two methods of valuing intangibles—either to add the value of the stocks and bonds and deduct the tangibles, or capitalize the net income over a fair period (without deduction of anything for capital account) and deduct the tangibles; that the Board had not followed, in its formulas, either course; but had valued the foreclosed stock of the railroad (a foreclosure having been entered in May, 1915), par $4,822,000, at $12,934,533; that the road had paid only one dividend in 1912, on its preferred stock only, and that, in round numbers, $18,000,000 of stock and debt had been eliminated by the foreclosure of 1910 (Tr. 151-3); that the railroad commission valuation was $32,471,275, being of tangibles, unvalued tangibles $1,542,065, and that the commission made the valuation for rate regulating purposes and permitted no income on the alleged intangibles. (Tr. 153.) It was shown that the net income in the banner year of 1912 was $2,084,149.50, capitalizing at 7 per cent, $29,773,564.28, an experience never before or since equalled in the history of the property; that for 1913, the net income was $1,156,606.92, capitalizing at 7 per cent $16,522,727.43, and for 1914 the net income $65,405.27, capitalizing at 7 per cent $934,-361, and that the increase of taxation had been frightful. (Tr. 154.)

The Board was requested to state on what bases it proceeded. It was pointed out that it was well known, a matter of judical knowledge, that property over the State was not valued for taxation at

full value. (Tr. 45.) It was shown that there had been a great increase in the cost of service and labor, and an error in the returns made to the State Tax Board was corrected by the Tax Commissioner of the Ry. The Board was requested to explain the formulas, and replied that it had acted on the formulas and that the ratio had been obtained as appears therein. It was pointed out that all of this was misleading and that the gross receipts in 1914 had been $9,600,000 and the net income less than $70,000. The Board stated that it had found stock quotations of the T. & P. stock around 12 cents on the dollar, and had taken its stock as worth 12 per cent of par, and that this approximated the ratio between gross income and total capitalization. After some discussion the Board was requested to explain why they did this and what bases they had but declined, one of them stating that it seemed to be a "mystery." Counsel protested and again urged the statement of the basis, and the Board stated that they were there to hear evidence and not to answer questions. (Tr. 167-8.)

The appointment of Messrs. Baker and Lyon as receivers was exhibited to the Board and a decree of foreclosure entered May, 1915. The railroad commission valuations were shown as stated above and the indebtedness of the road upon the mortgage approximating the amounts stated in the formulas.

The Court is referred to the opinion of the Court of Appeals summarizing all of the material evi-

dence, commencing page 400 of the Transcript. On trial it was shown what was the net income for 14 years back of 1915, and that on the valuations of the Texas Railroad Commission this yielded an income of .04636 per cent on the average. (Tr. 194.) The whole statistical history of the railroad was gone into but need not be here further stated, except that there was a substantial decrease in the capitalization from 1911 of about $10,000,000, the total in 1914 being $31,102,000. (Tr. 194-217.)

It was shown that there had been a great increase in operating expenses and that taxes had increased from $48,635.66 in 1915 to $339,841.24 in 1914, due to the increase of various taxing municipalities and semi-municipalities and other causes, the properties paying a total of $172.29 per mile of road owned in 1900, and $341.95 per mile in 1914.

Dunn, a banker, an expert on values of stocks and bonds and investments in Texas, testified that a conservative rate of interest would be 6 per cent or 7 per cent. It was then stated to the witness that the Railroad Commission valuation of the Ry. was about $32,000,000.00; that for the last 7 years the average income on this valuation was 3½ per cent; that the second mortgage had been foreclosed for about $14,000,000; that there was a first mortgage of about $11,200,000, and a floating debt of over $2,000,000, an aggregate lien indebtedness of approximately $28,000,000, and the par value of the stock $4,822,000, and he stated that the stock was worthless. (Tr., 204-5.)

Sherwood, a stock broker, having the same question put to him, answered as to the stock: "My opinion would be it is absolutely worthless, measured by my experience with stocks of that kind and from other stocks." (Tr., 207.)

It was shown that the railroad occupied highly competitive territory with much low-grade freight. (Tr., 216.)

Mr. Fay, Executive Officer, testified to the incompleteness of the Ry. and that it would require $6,000,000 to complete it to a working economic standard, and that this money would have to be borrowed from the outside because Texas people would not invest in railroads. He was entirely unable to explain the formula by any process of reasoning used by the Tax Board. (Tr., 225, etc.)

Holder, Tax Commission of the railway, testified that he rendered the physicals in the various counties, exclusive of rolling stock rendered in one county and then apportioned; that these physicals, exclusive of rolling stock, were rendered by him at $14,000,000, and the rolling stock for $2,168,968, or a total of about $16,000,000. (Tr., 234.)

It was agreed that the plaintiffs had paid all taxes assessed on its tangibles for 1915 in Harris County. (Tr., 236.) Defendants did not combat any of this testimony or documents in evidence, or statistical history, except to show a balance sheet including profit and loss and various items of $37,243,133.44. (Tr., 282.)

An attempt after the foreclosure of 1911, to obtain from the Railroad Commission some con-

cession as to value of intangibles, which the Railroad Commission *refused,* was shown. (Tr., 283.) The balance sheet, of course, showed debits and credits, and in no respect reflected the real values or capitalization. (Tr., 282.) Also, it was shown that an attempt had been made to have the Railroad Commission recognize interim certificates which the Commission had refused to do. It was shown that in previous years the Ry. had paid taxes on intangibles, so called, for a large amount. Various items of income were shown, and the pleadings of defendants made in the United States Court, in an abortive suit for injunction, wherein the Tax Board pleaded that the word "intangible" was an "arbitrary" term as used in the statute, and that they had assessed tangibles under the form of intangibles, that it was the duty of the Tax Board to place a valuation upon all of the property of the complainants not otherwise (highly enough) assessed; and that by the word "intangibles," this statute authorized the Tax Board to take up any local undervaluation by the County Boards. * * * The additional value to be taxed on a general and undefined term of intangible property * * * and that but for the valuation by the State Tax Board, all of the excess of value (that is excess of value of physicals over renditions thereof) would escape taxation altogether," and that no complaint could be made because of the act of the Board in valuing property of all kinds, through the act of the Board as supplemental to the assessments in the various counties; that the

Board had taken up the undervaluation of physicals in the word "intangibles" which they had made at $10,743,223 "under the general and arbitrary designation of value of intangible properties but that they had not taken up the whole value of the physicals in this way but only a portion thereof. This answer was signed by all the members of the State Tax Board and sworn to by Mr. Bagby, Tax Commissioner, and one member thereof. (Tr., 349, 350, 353, 354, 366, 367.)

To this astonishing admission that the Board had valued the tangibles under the form of intangibles it was answered that they had no such power. On the trial of the case the same position was taken, both in the pleadings and in the testimony.

It is proper to call attention to the fact that this Court has judicial knowledge, as well as proof, that tangibles are under assessed, all over the State of Texas. We have a constitutional right to value railroad tangibles on a parity with those of other persons, as is provided for in the Constitution of Texas, cited below. The railroad tangibles were valued by the County Board as shown above, on full parity with those of every other person and it will be, of course, presumed, until the contrary is shown, that this parity existed in the various counties, and that the county boards obeyed the law in bringing about such parity. This is the real ground on which the Board acted as shown in the opinion of the Court of Civil Appeals, commencing at page 400 of the Transcript and which we do not

repeat here because it is an essential part of our argument and we request that that opinion be carefully read.

This case, therefore, stands upon the admitted pleaded and undoubted fact, that the State Tax Board put forward the foregoing formulas and acted on them and nothing else, except that they could tax tangibles under the form of intangibles, and that they could review the action of the various boards of equalization valuing tangibles in 37 counties, without the knowledge of the property owners and obviously without any evidence, and set aside the semi-judicial act of those Boards in camera. Whether or not the State statute could so constitutionally permit them to do, without violating the Fourteenth Amendment is a discussion which probably belongs under the Writ of Error; but it belongs under the Writ of Certiorari to show that the Board, now claiming to be protected in their semi-judicial act, claimed the right to overturn the semi-judicial acts of the assessors and Boards of equalization of 37 counties as to tangibles, secretly, and without any evidence whatsoever.

We were entitled to have our property, in the various counties, undervalued, because the property of all other persons was universally undervalued and because the State Constitution and the Fourteenth Amendment provide for parity.

Mr. Bagby was the only member of the State Tax Board produced to testify on the case. He stated that he had read newspapers and considered the

subject of intangibles; that he took into consideration the formulas and independently of them stated the findings that the stock of this railroad foreclosed and insolvent was at an enormous premium of over $8,000,000, and that the intangibles therefore existed, and that they reflected their best judgment of his associates. This was a general declaration by Mr. Bagby, but on cross-examination he took up his formulas and went through them in great detail, maintaining that they were mathematically correct; that he had submitted them to the Superintendent of Public Instruction who said they were correct as a matter of figures. Asked as to the I. & G. N. Ry., he stated that the Board had applied the formulas to that Ry. and was asked whether a result of the formulas was correct, as to "our intangibles," A. "Yes, this is correct." "Q. You found these intangibles to exist, therefore it follows by the application of that formula?" "A. Yes, sir." (Tr., 361.)

He then stated that the formulae were private, and not public property and private papers, but he concluded to give them up. He was asked why in the formula the Board had valued the stock of the insolvent foreclosed railroad at a premium of about $8,000,000, "A. We followed the figures, sir"; that the Board had no reason for what they did except the figures of the formula and the condition of the road as a going concern. Asked what other information, he said the evidence offered by the plaintiffs to the Tax Board, which, however, did not move the Board; that the Board was guided by the

formula and the things expressed in the formula and the fact that the Railroad was a going concern, that the Board was unwilling to accept the Railroad Commission's valuations, did not look at net income in the case of this Ry. Asked why the Board adhered to their preliminary estimate on the formula and found as intangibles the exact result of the formula, he said: "Just like I explained before." "Q. On this formula?" "A. Yes, sir; we did on the formula and stuck to the formula, yes, sir." (Tr., 362, 363.)

He stated that the Board had investigated the railroads generally and this Ry., and did not mean that its par of stock, $4,822,000, was worth $12,934,933 on the formula, as market value. But that as far as intangible assets were concerned, "that it was worth $12,934,333 * * * so far as the taxable value, yes, sir." That he had read some newspaper statements. (Tr., 364.) As to the Board's valuing tangibles, under the forms of intangibles he said that he had read and sworn to the answer filed in the Federal Court, but that it was very embarrassing to ask him whether they had intended to value tangibles under the forms of intangibles, but that the Board had taken the word "intangibles" in the statute to be "an arbitrary designation," "Yes, sir; in so far as the I. & G. N. is concerned." (Tr., 365, 366.) After some examination, the court asked the witness, over objections of the defendants, whether or not the Board had applied this statute so as to value tangibles as intangibles as set out in the pleadings read to him

in regard to this Ry., and he answered: "Yes, sir; just as stated there, as far as intangible assets, yes, sir." "And further, you understood the law to mean that, didn't you, and acted on this principle?" "A. Yes, sir." (Tr., 367.) He said that he had so testified on the hearing for a temporary injunction in the Federal Court, and that, the finding of the value of the intangibles strictly defined, but represented the intangibles taken "arbitrarily" to a certain extent. (Tr., 357, 358.) He then stated that the formulae had been applied to some of the largest railroads in Texas, producing the various results referred to above (Tr., 367-373), from which it appeared that the I. & G. N. stock was more heavily loaded with lien indebtedness than that of other roads, *e. g.*, F. W. & D. C. was worked out on the formula, with much lower lien indebtedness than this Ry. (Tr., 360-1.) He admitted that the G. C. & S. F. was a much larger and more profitable road than the I. G. & N. and was asked why the value of its stock was double par by the Board and this Ry. for more than double and answered: "Just on account of the way the Board did." "Q. Just on account of the formula?" "A. Yes, sir; but the G. C. & S. F., I want to explain, was reduced by the Board, not reduced by me." (Tr., 360—1.)

As to the T. & P. the witness was asked why its capital was discounted by $34,000,000, and the stock put at a premium of $8,000,000 when the mortgage indebtedness of the T. & P. Ry., as shown in the formula, was less proportionately than that

of this Ry. He answered that it was worked out on the formula, and that intangibles for the T. & P. were taken as the formula brought it out.

"Q. Just like you did on the I. & G. N.?
"A. Yes, sir."

Counsel for the defendants attempted to get the witness to modify, but Dabney, for the plaintiffs, objected and the witness answered: "A. I brought everything I could, just the same way." (Tr., 372-3.)

Meyer, for the defendants: "You have not said that. You said you rested it entirely on the formula." (Tr., 363-4.)

Lefevre, expert mathematician on valuations for corporations, etc., and the engineer, testified as stated above, and explained the formula, and that on it, results between railroads were necessarily uneven and absurd. (Tr., 383-31.) The formulae and findings of intangibles thereon for all the railroads are set out. (Tr., 115-149.)

The second issue of the case, for the equalization of any intangibles which might be found (it is denied that there were any), was not ruled by the Court of Civil Appeals, as appears above, it holding that there were no intangibles to equalize. But the Supreme Court has held that they were intangibles, in the full amount claimed. Upon the above statement it is inconceivable to us how the Supreme Court held there was any evidence, outside of the formulas, and how the Supreme Court held that such other evidence justified the result

reached, when Bagby and the Board plead that they acted on the formulas and all the evidence showed that they did so act and Mr. Bagby repeatedly so acknowledged. The Supreme Court has found that, because Mr. Bagby said that he read some newspapers about intangibles valuation, he thought that everything was allright. It is frantic nonsense to suppose the existence of these huge intangibles, based upon a finding of the enormous premium of over $8,000,000 for this foreclosed non-dividend paying stock, and on the application of the formulas and the so-called Rule of Three principle to which Mr. Bagby adheres. This is a litigation of the Rule of Three as expounded by the Tax Board.

Coming now to the question of the equalization the plaintiffs showed by the testimony of Wolf and Peden a complete investigation, for the previous year, of the land sales as they appear upon the public records of Harris County, Texas; that the total aggregated $3,352,392 and assessed values of $1,544,769. (Tr., 237.)

Various real estate experts testified at length. Heiser, former chief assessor's deputy, testified to the method pursued by previous and present assessors; that the county was split up by school districts, and lands valued at a blanket rate for each district. He went over each district ot the county and gave his estimate of true values and testified to the assessed values, showing that the lands were valued for taxation at not over one-third of their true value. (Tr., 238-244, 249, 276.) This was a

systematic method. Livestock and bankstock assessments were also shown, bankstock at a higher rate, but much below value. Bank stocks varied from 43 per cent upward of value. (Tr., 254-6.)

Other real estate men testified to the same general effect. (Tr., 265-270.) Blake, chief clerk of the Assessor, testified that he had been in the Assessor's office over 12 years; that the basis for assessment was supposed to be two-thirds of true value, bank stock 70 per cent, the Board of Equalization being the ultimate authority; that in his opinion generally not more than 40 per cent of the value of the lands was obtained, say 50 per cent of merchandise, livestock taken at $8 a head; sheep, $1; swine, $5; goats, 50 cents; as to the city property the plan was for two-thirds value, but he didn't know how much was obtained, but that Lidstone could explain. As to personal property, the word of the taxpayer usually went. (Tr., 244-9.)

Lidstone testified that he was employed in the Assessor's office, and had made careful investigation of values in the city of Houston which worked out on real estate about 50 per cent, the scheme being two-thirds, but the county average would be 30 to 40 per cent; that only the intangibles of railroads were put upon the rolls, through large corporations, among them the Texas Company and numerous others were in Harris County. (Tr., 265-270.)

Defendant Ward, county judge, member of the Commissioners' Court, testified that the Board

tried to do the best it could and get true values. He was a member of the Board of Equalization and when confronted with his own tax renditions admitted that property worth $300 or $500 per acre was valued for taxation at $100, but said that he had not sought to get advantage by being a member of the Board for his own property but that it came in, he thought, on a scheme on a general equality with others. (Tr., 306, etc.)

Ammerman, ex-County Judge and ex-member of the Board of Effualization, testified that it was intended to get full rendition, but that as member of the Board of Equalization he had taken his own property at whatever the assessor put it, and supposed that the assessor showed him no favoritism; that he knew that it was not at the true value and that the property was being under-assessed and supposed this was done on the system of under-valuation. (Tr., 310, 305.)

Kelly, real estate agent, testified at great length on the values of the I. & G. N. property on the basis of values of abutting property, over the objections of the plaintiffs, and Parker, engineer of the Railroad Commission to reproduction cost in Harris County, and said that, except to a negligible extent, the Railroad Commission valuation was of tangibles alone. (Tr., 329, 375, etc.)

Necessarily the trial of this case involved a great minutiae which it would be improper to state here. The salient questions of fact are: Did the Tax Board act fraudulently or in gross error, or against all evidence, or in a way which no reasonable mind

could follow? Did they act upon the formulas as they testified absolutely they did? Did they value tangibles under the guise of intangibles as they pleaded and testified they did? Were the formulae their bases outside of their valuing tangibles under the form of intangibles? It is difficult to follow these fancies, and to suppose that sane men could do the things which were pleaded, admitted, proved and uncontested in this case. What right did they have to refuse to state the bases of their action at the hearing? What right did they have to secretly revise the findings of the Boards of Equalization on the equalization of tangibles in 37 counties? As much semi-judicial acts as their own, and to do this without any evidence whatever. It is impossible to suppose that these valuations made by the county boards were below the valuations of tangibles of other people in the counties. Railroads do not receive such favors, and yet the State Tax Board behind its so-called semi-judicial position assumed this without evidence. It is conceivable that tyrannical bureaucrats will do such things, but the most inconceivable thing is that they would adopt the formulas on which they proceeded.

In conflict with the finding of the Supreme Court, that it appeared that the formulae were supported by independent evidence, is not only the above, but also the stipulation with which the Statement of Facts starts out, to wit:

> "The plaintiffs offered in evidence the following formulas in this Section set out below

and proved that they were made by the State Tax Board, *and that the results thereof had been adhered to by that Board in their valuation or non-valuation of intangibles,* and that they covered all the intangible valuations of the railroads of Texas for the year 1915, except that No. designated (*a*) below was set aside by the Board and the one designated (*b*) below adopted by the Board, as applicable" to this Ry. (Tr., 113.)

This is followed by the formulae and ultimate findings, *adhered to by the Tax Board,* as showing intangible values of all the railroads in Texas for 1915 (Tr., 114-149.) The statement was agreed to, as containing a true and complete statement of all facts proved on trial, and of all evidence bearing upon any controverted issues of fact. (Tr., 399.) It thus appears that, not only during the trial, but until after the statement of facts was agreed on, the defendants rested upon the formulas, for they make the agreed statement *"that the results thereof had been adhered to by the Board."*

It appears from the above that the following facts are undisputed and can not be denied:

(1) The Board found the intangibles to exist by the use of the formulas and stuck to them, and these formulæ necessarily involve a wrong system and lead to wrong results.

(3) That it is impossible that the ~~new~~ claim equality, as between different railroads, all of the formulæ and all of the results of intangibles found therefrom and adhered to by the Board being set out in the record thereof. (Tr., 114-149.)

be sustained

(3) That it is impossible that the non-dividend paying stock of this foreclosed insolvent Ry. was at a premium of over $8,000,000 above par, which was $4,822,000.

(4) That to suppose that this insolvent Ry. had intangibles of the $10,743,223 is shocking to common sense, its whole capitalization being found to be $31,003,500 by the Board, and the Railroad Commission of Texas finding its tangibles to be of a greater value than that amount, and the income experience not justifying an income on such amount.

(5) That it was completely shown that there were no intangibles, or if any, then in some far smaller amount.

(6) That the Board acted with a purpose to value tangibles, under the form of intangibles, as they acknowledged they did, pleading, admitting and testifying that the word "intangible" was an "arbitrary."

(7) That the Board did not intend to make a fair and just valuation, but did intend to discriminate against plaintiffs.

(8) That, whether or not the Board intended to discriminate or not, their action was so grossly unfair and contrary to all evidence, as to shock any reasonable or just mind.

(9) That the Board, at their hearing, had full evidence before them, and declined to state the bases upon which they were acting, except the formulæ; in fact having no basis except the then concealed purpose to value tangibles under the form of intangibles.

The applicable Constitutional provisions of the Constitution of Texas are the following:

Sec. 19, Art. I. "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Sec. 1, Art. VIII. "Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law."

Sec. 3, Art. VIII. "Taxes shall be levied and collected by general laws and for public purposes only."

Sec. 8, Art. VIII. "All property of railroad companies shall be assessed, and the taxes collected in the several counties in which said property is situated, including such of the roadbed and fixtures as shall be in each county. The rolling stock may be assessed in gross in the county where the principal office of the company is located," then, provided that the assessment of the rolling stock shall be apportioned to the several counties on a mileage basis.

Sec. 14, Art. VIII, provides for the election of an assessor for each county.

Sec. 18, Art. VIII. "The Legislature shall provide for equalizing, as near as may be, the valuation of all properties subject to or rendered for

taxation (the County Commissioners' Court to constitute a board of equalization); and may also provide for the classification of all lands with reference to their value in several counties."

Sec. 18, Art. V, near end. "Each county shall in like manner be divided into four Commissioners' precincts, in each of which there shall be elected by the qualified voters thereof one County Commissioner, * * * the County Commissioner so chosen, with the County Judge, as presiding officer, shall compose a County Commissioners' Court."

The portions of the applicable statutes involved for construction are set out below. Others summarized as an introduction or explanation of such quoted portions.

Chapter 11, Title 126, provides for the rendition of property for taxation to the Tax Assessor of each county, and that each person shall list his property for taxation under oath, there being no requirement that he should swear to any valuations, (Art. 7517) of course exercising his right for constitutional equality. Taxpayers in Texas do not swear to the valuations which they suggest, as all property is undervalued. If the statute required them to make this oath it would obviously be unconstitutional, as requiring them to swear falsely against their constitutional rights.

Chapter 12, Title 126, provides for the election of an Assessor and his duties. Article 7564 provides for the performance of their duties by the Commissioners' Courts as boards of equalization. It thus appears, by the constitution and the stat-

utes, that all tangible property must be rendered and equalized in the counties where it is and taxes paid on it only there, with the exception of railroad rolling stock, which, as provided by the Constitution, is valued at the headquarters of the railroad and apportioned on a mileage basis to the counties penetrated by the road. The Supreme Court of Texas has held that intangibles are in their nature so difficult to localize that they may be valued by a State Board. (M. K. & T. *vs.* Shannon, 100 Texas, 379, etc.)

The State Tax Board, therefore, can only have jurisdiction over intangibles, as is provided for by Chapter 4, Title 126 of the R. S. of Texas of 1911. It is composed of the Comptroller, the Secretary of State, and the Tax Commissioner. It is made the duty of this Board to make a thorough investigation, and they have power to administer oaths, summon witnesses. (R. S., 7410-7412.) Their jurisdiction is limited to incorporated railroads, ferry companies, bridge companies, turnpike or toll companies, and every person doing business of the same character. (R. S., 7414.) The railroads are required to make preliminary statements, annually, to the Board (R. S., 7416-18); and the Board is then required, upon examination of such statements and upon any additional evidence, to make a preliminary estimate and apportionment of the intangibles. (R. S., 7419.)

These hearings are to be held by the Board.

Articles 7420 and 7422 are now set out in full as they contain the gist of the statute.

ART. 7420. Same.—In so far as the other evidence and information adduced before said State Tax Board does not make it appear to the members of said Board to be improper or unjust to do so, said Board shall, in fixing the true value of the entire property of such individual, company, corporation or association embraced within the provisions of this chapter, take as a basis therefor the aggregate market or true value of all its shares of stock, adding thereto the aggregate market or true value of all indebtedness secured by any mortgage, lien or other charge upon its property or assets, and the sum so produced shall be deemed and treated as the true value of said entire property. And where the individual, company, corporation or association does business and has property, both within this State and outside of it, in ascertaining the true value of its property within this State, said Tax Board shall next ascertain from said statements, reports and evidence, if any, or otherwise, the true value, in the locality where the same is located, of each such several pieces of real estate situated outside of this State, and of its other properties, if any, outside thereof, and not specifically used in the business of said individual, company, corporation or association, and the aggregate of said value shall be deducted from the gross value of the property as above ascertained; and the result of said deduction and the sum or value thereby obtained shall be deemed and treated as the true value of all property of such individual, company, corporation or association in, actual use in its business. Said Tax Board shall then fix the true value of the property of such individual, company, corporation or association within this State, using as a basis and being guided so far as it shall not believe it unjust to do so, by the

proportion which it finds to exist between the total lines or total receipts within this State and outside of it, and lines controlled or operated, or the receipts obtained, entirely within this State, so that there shall be apportioned to this State, as the true value of the property within its borders of each individual, company, corporation or association doing business within and outside of its limits, such proportion of the true value of all the property of such individual, company, corporation or association which is specifically used in its business, as is borne by its total lines or total receipts within this State when compared with the total lines or total receipts both inside and outside the State of Texas. From the entire value of the property within this State, when ascertained as directed by this chapter, said State Tax Board shall deduct the true value of all the tangible property of such individual, company, corporation or association within this State, as so ascertained by said State Tax Board, and the residue and remainder of value shall be by said State Tax Board fixed, determined and declared as the true value of the intangible properties owned and held by such individual, company, corporation or association within this State. Said State Tax Board shall apportion the sum of the said total taxable values within this State to the counties in which such individual, company, corporation or association does business, in proportion to the amount of business done in and receipts derived from each such county, except that, in the case of a railroad company, the apportionment to each county shall be in proportion to the line or lines of such individual, company, corporation or association therein. In apportioning the values of the aforesaid properties, said State Tax Board shall have the right and it shall be its duty to make

use of and consider all evidence which may be put before it and all material facts at its command; and, if it shall believe that some method of calculation other than that specifically prescribed in this chapter is necessary in order to produce just and lawful results, said Board shall follow that method of calculation which it believes best calculated, under all circumstances, to bring about a just, fair, equitable and lawful valuation and apportionment of such property. (Id., sec. 14.)

ART. 7422. Board to certify amount of intangible assets to assessors. Thereafter, and not later than the twentieth day of June of each year, said State Tax Board shall make, in accordance with the provisions and requirements of this chapter, a final valuation and apportionment of the intangible assets aforesaid, of each and every such individual, company, corporation and association, and shall as soon after such twentieth day of June as practicable, certify to the tax assessor of each county in this State to which any portion of such intangible assets of any such individual, company, corporation or association is found by said Board to be apportionable for taxation and so apportioned, the amount thereof, as fixed, determined and declared by said Board, and thereunto apportioned by said Board, together with the name and the place of residence or place of business of the owner or owners of the property embraced in such valuation and apportionment; provided, that such final valuation and apportionment of such intangible assets, properly apportionable and apportioned by such said State Tax Board to any unorganized county shall be by said Board so certified to the tax collector of the county to which such unorganized county is attached for judicial purposes. It shall be the duty of the tax assessor of such county, upon receiving such certificate

or certificates of said State Tax Board, to place, set down and list upon forms prescribed by the Comptroller of Public Accounts for such purpose, upon the tax rolls of his county, and of each unorganized county which is attached to his county for judicial purposes, as the case may be, any and all such intangible assets, at the value so fixed, determined, declared and certified by said State Tax Board. Such county tax assessor shall extend and prorate upon said rolls the State and county taxes upon all such intangible assets in the same manner as taxes upon other property are extended and prorated. Said assessment, valuation and apportionment of such intangible assets so fixed, determined, declared and certified by such State Tax Board shall not be subject to review, modification or change by the tax assessor of such county, nor by the Board of Equalization of such county; and the State and county taxes thereon shall be collected by the tax collector of such county and accounted for by him in the same manner and under the same penalties as taxes upon other property. All State and county ad valorem taxes upon all intangible property in this State belonging to any individual, company, corporation or association embraced by this chapter shall be assessed under its provisions and not otherwise; but ad valorem taxes upon all other property of any and all such individuals, companies, corporations and associations shall be assessed as is now or as may hereafter be provided by law. (Id., sec. 16.)

(1) Sec. 1 of the 14th Amendment, as well as the fifth amendment to the Constitution of the United States, are derived from the Great Charter, and is carried into the Constitution of Texas,

where, as in most states, they had existed before the adoption of the 14th Amendment. That Constitution provides that taxation shall be uniform and equal, and property taxed in proportion to its value, and all railroad property, with the exception of the rolling stock (and as construed intangibles), taxed valued and equalized, and the taxes collected, in the counties where the tangibles are.

The State Tax Board has only jurisdiction over intangibles of certain taxpayers, and is directed to find the intangibles by deducting the physicals from the total value of stocks and bonds, unless it appears that is a wrong method. Then they can pursue some other method "in order to produce just and lawful results." (7420 above.)

It is the contention of the Board that they had the right to consider the word "intangibles," in the statute, "as an arbitrary," and to add to the local valuations of tangibles, whenever they considered them too low, by putting on something more under the (dis)guise of intangibles.

It seems never to have occurred, to the Supreme Court of Texas, that this would lead, not only to double taxation, but taxing tangibles in counties where they did not exist, under all sorts of varying county levies for different amounts on different percentages, while the property of other taxpayers could not be so dragged around and variously taxed. But more than this: The Supreme Court states that the acts of the Tax Board are semi-judicial. Then also, the acts of the 37 County Boards of Equalization and 37 Assessors thereof,

are semi-judicial. It comes to this: That the Supreme Court, in affirming this action of the Tax Board, holds that the Tax Board can secretly revise and cancel the acts and the findings of the County Assessors and of the Boards of Equalization, and, without notice, in flat contradiction to the Constitution of Texas, and to the provisions for equality, cancel and set aside these semi-judicial findings *in camera.*

As pointed out by the Supreme Court, the findings of officials and boards, equalizing and valuing property for taxation, are presumed to be correct until the contrary is shown, but here we have a case where, without any showing and without any evidence, the State Tax Board sets aside the findings of 37 Assessors and 37 Boards of Equalization as illegal and unfairly made. It is, of course, the right of the Ry. to have its property in each county equalized down to the valuations of others, and this is presumed to have been done, but the Supreme Court upholding the semi-judicial act of the State Board, without evidence, overturns the semi-judicial acts of 37 assessors and 37 Boards of Equalization, and transfers for unequal and discriminatory taxation, tangibles of the Ry. into many counties where they do not exist. In addition to the presumption that the County Boards and Assessors have equalized values on tangibles justly, and on an approximate parity (M. K. & T. of Texas *vs.* Shannon, 100 of Texas 390), nothing can be made of the contention that all property should be valued at full value. As long as it is not done, each per-

son is entitled to constitutional equality, and the Court, judicially knows, without evidence, as a part of current history that property is enormously undervalued for taxation.

Cummings *vs.* Bank, 101 U. S., 157.
Railroads *vs.* Board, 85 Fed., 309.
Trustees *vs.* Guenther, 19 Fed., 399.
Board *vs.* C. B. & G. R. R., 44 Ill., 238-9.

The Supreme Court has affirmed that act as done by the Tax Board in collision with the express finding of the Court of Appeals, that it could not be constitutionally done. (Tr., 413, commence with bottom paragraph, 412.) The Supreme Court has affirmed the Tax Board's construction of the statute, and acts thereon. That, therefore, is the Supreme Court's construction of the statute. Its unconstitutionality, as in conflict with the Fourteenth Amendment, as so construed, on this ground clearly comes within the writ of error which has been granted. Nevertheless, the acts of the Board and what they did, whether under the statute or not under the statute and independently of any theory of Statute, or its constitutionality, clearly come within the writ of certiorari applied for and therefore are here discussed.

In connection with the acts of the Board and the statutes, it is important to define intangibles. This is a Texas case and not now discussing the constitutionality of the Statute as construed by the Supreme Court. We adopt that court's definition of what intangibles mean under this statute, to wit:

"The intangible values of the railroad company are the values of the railroad property above the values of its physical assets, which intangibles *ordinarily result in the profits of its buiness as actually conducted.*" (M. K. & T. Ry. of Texas *vs.* Shannon, 100 Tex., 390.)

In other words, intangibles result, under the Texas statute directly construed in the Shannon case, from the profitable conduct of a railway. How could there be these huge intangibles with the financial and other history of this Ry. as shown above?

(2) It is not necessary to show a wrong volition by the Tax Board, yet that being shown as appears above, is a ground of relief. This point need be only briefly discussed; that the wrong volition existed can not be doubted. The Court of Appeals has found that the Board acted arbitrarily, and this appears overwhelmingly from all evidence. We do not feel justified in doing more than to cite a few of the numerous cases, and this without quotation:

Cummings *vs.* Bank, 11 Otto, 153; 25 L. E., 903.

Raymond *vs.* Traction Co., 207 U. S., 20.

State Board *vs.* People, 191 Ill., 528.

Lively *vs.* M. K. & T. Ry. of Texas, 102 Tex., 559.

Johnson *vs.* Holland (Texas), 43 S. W., 71, and 17 Texas C. A.

Taylor *vs.* L. & N. R. R., 88 Fed., 372 (Judge Taft).

In the last case it was held that the action of the Board was of such a character as to make it impossible to suppose that they did not intend to do wrong. No one can read the evidence in this case, as given in the hearing before the Tax Board and on the trial, without being convinced that the Board acted on a wrong volition. As said in the Johnson case above, the hearing is a farce unless the Board will listen to what is put before it. In that case no other evidence was introduced before the Board, except that of the property owners, and it was ignored as in this case. On this trial Mr. Bagby said that the Board had no basis, except Rule of Three, and except that they had valued tangibles under the form of intangibles, and that he was embarrassed by being questioned about that matter, but intangibles were "arbitrary" as far as this railroad was concerned and otherwise as has been set out above. On the hearing the Board refused to state what were their bases and what was within their minds, as has been fully shown.

It has been contended that a tax board can refuse to state its bases, but this is overthrown. Mr. Bagby was not put on the stand at trial by the plaintiffs, but by the defendants, when, of course, plaintiffs cross-examined. Taxpayers "are entitled to a judicial investigation and are entitled to know the actual processes by which their property has been assessed"; and it is direct legal fraud to refuse to state, as was done in this case (R. R. & Tel. Cos. Cases *vs.* Board, 85 Fed., 311

and 317). If this be not the law, then the taxpayers' day for a hearing before the board is not a day but a very dark night; and as one member of the Board said on the hearing in this case before them, that it seemed to be a "mystery" what they had done. That was intended, of course, as sarcasm, as well as to emphasize the power of these bureaucratic gentlemen.

It staggers the intelligence to suppose that the Board acted in good faith.

(3) But a wrong volition need not be proved because the Board systematically used erroneous principles and formulas. This also is a principle too well established to permit extended discussion. If a general system be adopted, which must necessarily work inequality or gross errors, then no matter what the intention of the Board, their act is unconstitutional, violative of the equality provisions of the State Constitution, as enforced and protected by the First Section of the Fourteenth Amendment. Here a system was adopted and applied to almost every railway in the State, bringing about the most violent discriminations and grossly erroneous results. Therefore, if it could be supposed that this Board had intended to act justly, then we would fall back upon the position that their system was utterly wrong.

German National Bank *vs.* Kimball, Collector, 13 Otto, 732 near end.

Taylor *vs.* L. & N. R. R., 88 Fed., 374.

Cummings *vs.* Bank, 101 U. S., 153, and 11th Otto.

State Board *vs.* People, 191 Ill., 528, 58 L. R. A., First Series, 513.

Coulter *vs.* Wiel, 127 Fed., 897.

Johnson *vs.* Holland, 17 Tex. Court of Appeals, 210, 43 S. W., 71.

R. R. & Telephone Cases *vs.* Board, 85 Fed., 305.

It was shown by the witness Lefevre, the mathematician, that the system followed by the Board brought about the most tremendous discriminations and had no relation to a fair result. It is a vain thing to now say that the Board did not follow that system. It is admitted at the head of the statement of facts that they did (Tr., 113), and the formulae applied to all the railroads of Texas are given in full with the varying results reached and stuck to, with very few exceptions. (Tr., 114-149.)

The opinion of the Court of Civil Appeals is clear upon this point, and shows a queer conception of the "Rule of Three" by which Mr. Bagby, member of the Board, testified they worked. The Board systematically adopted a method which contains the following errors:

It assumed that it could secretly set aside the semi-judicial findings of the valuation of tangibles of 37 assessors and 37 boards of equalization in 37 counties and assess tangibles under the form of intangibles. This was carefully suppressed in the formulas and on the hearing before them.

It then proceeded upon formulas which worked

unequally and on erroneous mathematical principles, recognizable by no sane mind—if comprehending the process used. These formulae ignore net income, proceed upon gross income, ignore the varying amounts of debt ahead of stock, and, in many instances, necessarily result in valuing at the highest rate the stock most loaded with precedent liens.

(4) When a valuation is against all the evidence or its overwhelming weight, then legal fraud exists, and while rational, sane minds can morally only act on evidence and according to the evidence, and therefore when acting against all evidence will be presumed to have acted fraudulently; yet an assessment made against all evidence or its overwhelming weight, is fraudulent and void, and, of course, violates the first section of the Fourteenth Amendment. This, again, we consider too well settled to admit of discussion.

We have pointed out above that there was no evidence, and what was done and agreed on.

State Board *vs.* People, 191 Ill., 528, 61 N. E., 339, 38 L. R. A., First Series, 513.
Tainter *vs.* Lucas et al., 29 Wis., 275.
Johnson *vs.* Holland, 43 S. W., 72, 17 Tex. C. A., 210

(5) No matter what the volition of the Board is, good or bad, a violation of the Fourteenth Amendment is brought about when the valuation is grossly excessive.

State Board *vs.* People, 191 Ill., 528, 58 L. R. A., First Series, 534.

It is a legal fraud without regard to intention when, by system or gross partiality, favors are extended to certain taxpayers over others.

We ask the Court to review the formulas in the Transcript. (Tr., 114-149.) The most violent discrepancies and discriminations were brought about and adhered to. When the formula was not followed, which was rare, an arbitrary discrimination was made. But usually the formula was followed, the discriminations being made through its operation.

(6) Methods of valuing for taxation, going railroads and their properties in action.

There are only two methods, to wit: Aggregating market values of stocks and bonds, or capitalizing the income at a fair rate. The Tax Board was authorized, by the statute, to proceed in any fair way, that is, in the second way, if they could not fairly proceed by aggregating the stocks and bonds and deducting the tangibles. (R. S., 7420, set out above.)

State Board *vs.* People, 191 Ill., 528, 58 L. R. A., 513.

Chicago Union Traction Co. *vs.* Board, 113 Fed., 557-567.

Raymond *vs.* Traction Co., 207 U. S., 20.

R. R. & Telephone Companies *vs.* Board, 85 Fed., 302.

In our opinion the aggregation of the value of stocks and bonds, if the gyrations of the stock market may be laid to one side, amounts to nothing more than the capitalization of the net income. Its capitalization over a fair period is the only way to value for taxation railroad property in action. We are not speaking of a case where some of the property lies out of action, as an unworked ore bed.

Now, it was for the Board to state what process they used, for the law required them to use a legal and just and equitable process. It was admitted that they could find no market quotations for stocks or bonds of this Ry. They valued it at nearly $40,000,000, disregarding income, experience, and the Railroad Commission valuations, and did this for the most part by putting a premium upon non-dividend paying foreclosed stock of $4,822,000 par, of $8,112,533.

In other words, the stock of this insolvent Ry. was valued at more than one-fourth of the value of the whole property and at more than one-third of the Railroad Commission's value. The property had to be valued *in solido* and the value of the tangibles deducted. The Board professed to follow this process. After the total unit value was placed no other process could be followed. It is unnecessary to repeat when the facts were all as shown above and found by the Court of Civil Appeals. The Supreme Court states that the Board perhaps did not follow the formulas alone. It undoubtedly did as all of the evidence shows and as is

conceded in the statement of facts. If they did not follow the formulas, what did they follow? At the hearing they declined to state, and have never stated, what they followed, except that one member said on the trial he had read some newspapers about valuations, and that the best of his judgment was that the formulae brought right results. These statements are not of any evidencial value.

As pointed out in R. R. & Tel. Companies *vs.* Board, 85 Fed., 311, etc., the stock and bond basis is a very dangerous and misleading one. The capitalization of the net income over a reasonable period of years is approved. We have shown what that capitalization of the I. & G. N. would yield, and it would be a mere repetition to go into this matter again.

Original cost is not value, nor present reproduction cost, but value for taxation must be determined from the use of the property as railroad property. (State *vs.* R. R., 94 Tex., 530; M. K. & T. Ry. *vs.* Shannon, 103 Tex., 390; R. R. *vs.* Wright, 151 U. S., 470; R. R. *vs.* Backus, 154 U. S., 429.)

Valuations must be the result of honest judgment. How did this Board value this Ry.? We do not know, except by the formulas, and the fact that they adopted a system by which they valued tangibles under the form of intangibles.

(7) It was double taxation to raise the value of the physicals locally in Harris County without making a deduction for the increased value of the tangibles from the aggregate value assigned by the

State Tax Board, for the court did not change the total valuation made by the Tax Board, but raised the value of physicals without any corresponding decrease of the amount of the intangibles. The Court stated that the additions made by him to the values of physicals were on top of the Railroad Commission's valuations, whereas the State Tax Board deducted as physicals only something over $28,000,000. The result of this is that the same property was valued for taxation twice. This was done, as shown above, by the District Court of Harris County.

(8) It is error to value railroad property for taxation on the basis of abutting property. It must be valued only on the basis of railroad uses.

R. R. Co. *vs.* Wright, 151 U. S., 470.
R. R. Co. *vs.* Backus, 154 U. S., 429.

In this case, as has been shown above, the testimony of Kelly, real estate expert, was heard at great length upon the values of abutting property, the objection being that such testimony was inadmissible for the purpose of tax valuations. The object of the testimony was to show that the tangibles of the Ry. were valued below parity in Harris County. Bills of Exceptions were carefully taken and the point has been brought up in accordance with the State practice, and it is thought that it is sufficient to state the course of such evidence as the full relevant matter, under the rule of this Court. It was given at immense length, as well as the testimony of Parker, objected to on the same

grounds, as to the reproduction cost of the tangibles of the Ry. in Harris County. Careful Bills of Exception were taken. (Tr., 103-107, bills D, E, and F.)

The testimony of Kelly and Parker appears in the Transcript at pages 329, 334, 375-381. Kelly's testimony advanced values a great deal on the basis of abutting values.

(9) An assessment which may exist to some extent, but which does not exist to the extent found, is illegal.

A distinction is sometimes made between ownership of the thing assessed in whole or in part, and the extent of the thing assessed, as distinguished from the non-existence of the thing assessed. If A owns a farm of 100 acres and it is assessed to him as containing a thousand acres, this is not a matter of over valuation, but over extent. And this has been applied to intangibles, as supposing a man had an extent of intangibles of a million dollars when he had only a thousand. In other words, there must be property to be valued to an extent corresponding to the valuation, or reasonable ownership corresponding to the valuation, otherwise the valuation is unconstitutional. (Galveston County *vs.* Galveston Gas Co., 72 Tex., 517.)

In Fargo *vs.* Hart, 193 U. S., 490, the point was involved on application to extent of intangibles; some were owned, but not to the extent to which they were assessed. The case has certain strong analogies to this, just as here it was assumed that the business volume would bear a proportion to the

stocks and bonds. This court said: "Certainly it is absurd to say that the business of such company will bear an exact (extent) ,or in proportion to the stocks and bonds which they may own." This point is dwelt on and developed. (See page 766, 48 L. E.)

(10) The Court erred in holding that we were not entitled to equalization, if there were intangibles, on the ground that the tangibles had been undervalued below parity of other owners in Harris County. This finding is based upon the finding of the Trial Court, that certain property of the Ry. was non-operative, in Harris County and to be valued on the values of abutting property, and that when so valued, the valuation for taxes would be so far below parity as to offset the valuation of intangibles as above parity. The finding has no support in the evidence because the whole evidence shows that the property of all other persons, on the average in the county was valued far below the percentage found by the trial court.

This point can only be considered on a full reading of the extensive testimony thereon given and outlined above. (Tr., 328-398.) It can not, we think, be reached by this Court, because the above will, we believe, dispose of the case.

(11) The failure to enforce each of the above principles involves a direct conflict with the first section of the Fourteenth Amendment to the Constitution of the United States. We have avoided citing many authorities. Each of the points has been litigated and relitigated in this Court, and

this Court has constantly maintained the propositions advanced.

Of general application, to many of the points, are the comparatively late cases by this Court of Union Tank Line Co. *vs.* Wright, 249 U. S., 282; L. & N. R. R. Co. *vs.* Greene, 244 U. S., 522; Greene *et al. vs.* L. & N. R. R., 244 U. S., 499; Ill. Central R. R. *vs.* Greene, 244 U. S., 555.

In many aspects these cases have a marked similarity to this case. But none can be found which have gone to the extreme of this case, or wherein any taxing authority has attempted to do the things which the Texas State Tax Board has done.

(12) The Supreme Court of Texas not only reversed this case but reversed and *rendered* it without jurisdiction, for that Court has no jurisdiction to render issues of fact found by the Court of Appeals, which has final jurisdiction thereof.

The case is as if the Supreme Court of Texas, which has no jurisdiction in criminal matters, should sentence a man to death, or as if it should take jurisdiction in that numerous class of civil cases of which it has no jurisdiction but of which the courts of civil appeals have final jurisdiction.

The exercise of this jurisdiction does not involve the constitutionality of any Texas Statute in conflict with the Federal Constitution. There is none bestowing it. Therefore, the point, we presume, must be presented under the application for a Writ of Certiorari, although we assign it in connection with the Writ of Error, which has been granted.

Section 6, Article V, of the State Constitution,

states: "The decisions of said courts (of Civil Appeals) shall be conclusive on all questions of fact brought before them on appeal of error." R. S. 1590, of Texas, provides: "Judgments of the Court of Civil Appeals shall be conclusive in all cases on the facts of the case."

It is a question of law whether or not there is any evidence. The Court of Civil Appeals has said there is no evidence to show intangibles and made numerous other findings of fact. According to the construction of the Constitution given by the Supreme Court of Texas, it has the power to reverse in a case where it finds there was evidence and where the Court of Civil Appeals finds there was no evidence, it being a question of law whether there was evidence or not; but that under these conditions it has no power *to render.* All of the conclusions of fact found by the Court of Civil Appeals are swept aside.

Guesti *et al. vs.* Galveston *Tribune,* 105 Tex., 508.
Pollock *vs.* Ry., 103 Texas, 772.
Bauman *vs.* Jaffrey, 86 Tex., 618.
Tweed *vs.* Telegraph Co., 107 Tex., 253-4.
Lee *vs.* I. & G. N. Ry., 89 Tex., 589.
Choate *vs.* Ry., 91 Tex., 410.

There are many courts in Texas of various jurisdictions. The Justices' Courts have no jurisdiction over land titles, suppose that they should assume it? They have no jurisdiction over regulation of railroad rates, and no appeal lies from a case in-

volving less than $20, but it has been known for such a court to hold that a rate was too high and render judgment accordingly, less than $20 being involved. Of course the litigants could be enjoined in these other courts. But here we have a judgment of the highest court of the State, with all the power of the State behind it. What State court can or will enjoin?

The Courts of Civil Appeals have final jurisdiction over boundary cases, and the Supreme Court none whatever, and so many other illustrations might be given. Can the Supreme Court of Texas hang a man when the sole final jurisdiction is the Court of Criminal Appeals? Let us suppose, to come closer to this case, that after investigation the Court of Civil Appeals should find, on an issue of fact that A was the son of B, could the Supreme Court of Texas reverse *and render* the Court of Civil Appeals and hold that A was not the son of B? If there was no evidence that A was the son of B it could reverse the Court, as that would be a law point.

Does it not violate a right under the Fourteenth Amendment for a Court of a State to issue a decree which it has no jurisdiction whatsoever to issue, and which lies only in the power of another Court? Is that due process of law? We are well aware that, if the ultimate Court of a State had said that the Constitution of the State or a statute of the State was thus and so, and bestowed jurisdiction thus and so, then that this Court would follow such construction and refuse to interfere. But

when the situation is the exact reverse, when the meaning of the State Constitution is plain, and when the ultimate Court of the State has said repeatedly that the meaning is plain and that it means that there is no jurisdiction, then can that Court, without any new construction and against the plain meaning of the Constitution, take jurisdiction where there is absolutely no jurisdiction and enter a final decree where it absolutely has no jurisdiction to enter such decrees. Is this due process of law? Though a Court has jurisdiction of a case it may not have jurisdiction to make any disposition of that case, but only some disposition thereof. It is a question of extent. A State Court so exceeding the extent of its powers will be reversed by this Court. (Windsor *vs.* McVeigh, 93 U. S., 282; U. S. *vs.* Walker, 109 U. S., 267.)

The Writ of Error was granted in this case upon most fundamental considerations. For one, that the intangible tax statute, as construed by the Supreme Court, was in conflict with the Fourteenh Amendment; that is, as construed by the State Tax Board, upheld by the Supreme Court; as authorizing discrimination, double taxation of tangibles, and the taxation of tangibles out of the counties where they were, and as authorizing the taxation of tangibles under the form of intangibles. On other points, the statute is attacked as in conflict with the Fourteenth Amendment. But the points are necessarily interrelated, especially the actions of the Board which would be in conflict with the Fourteenth Amendment, even if the ques-

tion of unconstitutionality of the statute, as enforced, did not exist, as it does. Therefore, the acts of the Board are also involved under a writ of certiorari.

We, therefore, respectfully request that the petition for the Writ of Certiorari be taken with the Writ of Error on submission and deferred until the case comes up on Writ of Error already granted.

We pray that the Writ of Certiorari be granted and such other relief as may be due to petitioners.

Respectfully,

DABNEY & KING,
Attorneys for Petitioners.

SAMUEL B. DABNEY, *Counsel.*

INDEX AND LIST OF CASES.

INDEX.

PAGE

Abbreviations 1
Statement of the Nature and Result of the Case.....1-12
Brief of the Argument.....12-26
Argument 26-64
Purpose of law to tax all properties except tangibles..... 27
Acts of tax boards conclusive unless fraudulent, etc..... 39
Value of stock separately considered..... 56
As to the formulae..... 57
The burden of proof..... 60
Conclusion 64

LIST OF CASES.

PAGE

Acts of 29th Legislature, Ch. —, Sec. 1 8
Acts of 30th Legislature, pages 462-469 30
Adams Express Co. vs. Ohio, 165 U. S., 114-229 50
Baker et al. vs. Druesedow, 197 S. W., 1043 4
Constitution of Texas, Art. 8, Sec. 1 33
Davidson vs. New Orleans, 96 U. S., 97 51
Fargo vs. Harpe, 193 U. S., 490 35
Greene vs. Louisville & I. Ry. Co., 244 U. S., 499, 61 L. Ed., 1280, 37 Sup. Ct. Rep., 673; Ann. Cas., 1917E, 88 53
Hibben vs. Smith, 191 U. S., 310 49
Kelly vs. Pittsburg, 104 U. S., 78 50
Lively vs. M., K. & T. Ry. Co. of Texas, 102 Texas, 545 11
Maish vs. Arizona, 164 U. S., 500-610 ..... 48, 62
M., K. & T. Ry. Co. of Texas vs. Shannon, 100 Texas, 379, 100 S. W., 138 ..... 8, 28
M., K. & T. Ry. Co. of Texas vs. Hassell et al., 123 S. W., 190 .. 11
Metropolitan St. Ry. Co. vs. New York, 199 U. S., 1 63
Nolan vs. San Antonio, etc., 81 Texas, 315 63
Ohio Tax Cases, 232 U. S., 576 43
Pittsburg, etc., R. R. Co. vs. Backus, 154 U. S., 421 .... 31, 44, 60
Revised Civil Statutes of Texas, 1911—
Arts. 7407-7426 2
Arts. 7415-7416 2
Arts. 7418-7419 3
Art. 7515 13
Art. 7517 13
Art. 7518 13
Art. 7520 13
Art. 7525 13
Sioux City Bridge Co. vs. Dakota Co., 67 L. Ed., 231 ..... 53, 55
State Railroad Tax Cases, 92 U. S., 575-606 ..... 7, 32, 40
State vs. Austin & N. W. Ry. Co., 94 Texas, 530 ..... 9, 29
Sunday Lake Iron Co. vs. Wakefield Twp., 247 U. S., 350, 353, 62 L. Ed., 1154-1156, 38 Sup. Ct. Rep., 495 53
Southern Ry. Co. vs. Watts, 67 L. Ed., 199 52
Western Union Telegraph Co. vs. Norman, 77 Fed., 13 30
Willoughby vs. Chicago, 235 U. S., 45 49

In the Supreme Court of the United States

OCTOBER TERM, 1923

JAMES A. BAKER, RECEIVER OF THE INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY ET AL., PETITIONERS,

vs.

KARL L. DRUESEDOW, TAX COLLECTOR, ET AL., RESPONDENTS.

BRIEF FOR THE RESPONDENTS ON THE PETITION FOR WRIT OF CERTIORARI.

ABBREVIATIONS USED IN THIS BRIEF.

Railway Company = International and Great Northern Railway Company.

Board = The State Tax Board of Texas.

Receiver = James A. Baker, Receiver of the Railway Company.

Supreme Court = Supreme Court of Texas.

Court of Civil Appeals = Court of Civil Appeals of the First Supreme Judicial District of Texas.

District Court = District Court of Harris County, Texas.

Record = The transcript of the record.

I.

STATEMENT OF THE NATURE AND RESULT OF THE CASE.

The statement of the case contained in petitioners' brief in support of the petition for a writ of certiorari can not be accepted by respondents and respondents here state substantially the issues as summarized in the opinion of the Supreme Court of Texas. (Record, pp. 541-548.)

The Acts of the Twenty-ninth Legislature of the State of Texas, approved April 17, 1905, as amended in 1907, constituting

Title 126, Chapter 4, Articles 7407 to 7426, inclusive, Revised Civil Statutes of 1911, and commonly known as the "Intangible Assets Act," created a State Tax Board composed of the Comptroller of Pubic Accounts, the Secretary of State and the Tax Commissioner of the State, the latter being an officer appointed by the Governor.

The act provides that certain corporations, including railroad companies, doing business in the State of Texas, shall pay, in addition to the ad valorem taxes on tangible properties, an annual tax to the State on their intangible assets and properties, and local taxes thereon to the counties in which said business is carried on.

Under the provisions of the said act, corporations coming within its scope are required to deliver to the State Tax Commissioner for the information of the State Tax Board, a statement, under oath, among other things, the market value of the outstanding stock, or if there be no market value, the actual value thereof; the assessed value, and also the true vaue of the tangibe property; each and every lien, mortgage or other charge upon the whole property or any part thereof and the amount of unpaid debts secured by each lien or mortgage, including the unpaid interest thereon and the true market value of every such debt; the gross receipts and the net income and earnings from all sources for the next preceding twelve months and the amount used for repairs, betterments and extensions. (Articles 7415-7416, Revised Civil Statutes of Texas, 1911.)

If the Tax Board, upon examination of the statements, shall believe that further information is necessary, it shall have the power, under the provisions of the said act, to demand such additional information as is in its opinion necessary, or to hear evidence to enable it to make a preliminary estimate of the tangible values. After having secured the information in the manner as above outlined, it becomes the duty of the State Tax Board to make a preliminary estimate of the value of intangibles of the corporations affected by said act, on or before May 31st of each year, and to notify the corporation whose property is sought to be taxed

of such estimate, whereupon the corporation may, within fifteen days from the time of the naming of the notice, appear before the Board to contest the preliminary estimate. After the hearing the board may make such changes as it deems just and proper. (Articles 7418, 7419, Revised Civil Statutes of Texas, 1911.)

The act further provides that:

> "In apportioning the value of the aforesaid properties, said State Tax Board shall have the right and it shall be its duty to make use of and consider all evidence which may be put before it and all material facts at its command; and, if it shall believe that some method of calculation other than that specifically prescribed in this chapter is necessary in order to produce just and lawful results, said Board shall follow that method of calculation which it believes best calculated, under all circumstances, to bring about a just, fair, equitable and lawful valuation and apportionment of such property."

I.

The Tax Board, after fixing the preliminary valuations of the entire property and of the intangible property of the railway company for the year 1915, gave the railway company a due notice of hearing and set the same for the 18th day of June, 1915. (Record, p. 543.)

II.

Prior to the hearing, the Tax Commissioner, at the request of the Railway Company, exhibited certain formulas by which the calculations, as to values, were made. An error appearing upon the face of the formula prepared for valuations of the Railway Company, was called to the attention of the Tax Commissioner, whereupon, the figures were amended, and the Railway Company notified of the amended preliminary valuations.

Under the preliminary estimate, the true value of the entire property was fixed at $39,116,033; the physical at $28,372,810; and the intangibles at $10,743,223. From the formula, it appeared that the capital stock issued and outstanding amounted to $4,822,000; the mortgage debt at par $26,181,500.

At the hearing upon the date fixed, the Railway Company intro-

duced evidence which may be summarized as follows: Valuation of tangible, $32,471,027; betterments made since such valuation, the cost of which added to the valuation made a total of $34,013,-092.07; net income for 1912, $2,084,149.50; for 1913, $1,155,-660.92; and for 1914, $65,405.21; outstanding capital stock and lien indebtedness, the same as that used by the Board in its formula.

Upon the conclusion of the hearing, the Board adhered to its preliminary valuations and upon a mileage basis apportioned to Harris County, $603,227 of the amount of intangibles so found, which at the rate of taxation applied by Harris County, State and county, amounted to $6,605.34. (Record, p. 543.)

III.

Whereupon suit was instituted in the District Court of Harris County, Texas, by James A. Baker and Cecil A. Lyon as receivers of the Railway Company against the Tax Collector, the county judge and county commissioners of Harris County, Texas, to restrain the collection of taxes assessed against the Railway Company for the year 1915 upon the value of its intangible property as found by the State Tax Board and apportioned by the Board to Harris County, Texas.

In the District Court plaintiffs were denied relief and judgment was rendered in favor of the Tax Collector on his cross action for the amount of the tax with interest. On appeal the judgment of the District Court was reversed and judgment rendered in favor of the plaintiffs granting an injunction restraining the collection of the taxes. (197 S. W., 1043.) (Record, pp. 541-542.)

IV.

Plaintiff contends that the Intangible Asset Act is unconstitutional being in violation of various provisions of the Constitution of the State of Texas and of Section 1 of the Fourteenth Amendment to the Constitution of the United States; that in fact it has no intangible property; that, if in fact, it had intangibles, the same were, by the use of a fundamentally false formula and

method which no reasonable mind could in good faith follow, grossly and arbitrarily overvalued, resulting in discrimination against it and in favor of competing roads and that the action of the Board, regardless of the motive prompting them, was a legal fraud. (Record, p. 543.)

V.

The Supreme Court of Texas held, when the case reached it on writ of error that the decision of the Tax Board in the matter of valuations was quasi judicial in its nature and that plaintiff's action was in the nature of a collateral attack upon a judgment of a quasi judicial tribunal which could not be justified in the absence of fraud or the equivalent; lack of jurisdiction; an obvious violation of the law, or the adoption of a fundamentally wrong principle or method, the application of which substantially injures complainant. No mere difference of opinion as to the reasonableness of its valuation, when such valuations, though deemed erroneous, are the result of an honest judgment, will warrant interference by the courts. (Record, pp. 543-544.)

VI.

That the formulas, which the Railway Company attacked as fundamentally wrong, were used as the bases for the preliminary estimate of valuation. These formulas were exhibited to the representatives of the Railway Company prior to the hearing and were the subject of discussion at the hearing. The process used by the Board in reaching its preliminary valuation is wholly immaterial, the ultimate conclusions or final valuations being the matters under investigation; and unless it be shown that the method used brought about unjust and unlawful results, its judgment will not be disturbed. (Record, p. 544.)

VII.

The evidence by the Tax Commissioner is to the effect that the Board, in assessing intangibles of all railroads, considered all the evidence and information, and that, disregarding the mathematical

calculation, the valuation finally determined represented in each instance the best judgment of which the Board was capable under the circumstances; that the Board withheld its decision in each instance until the evidence was all in, and if the formula did not reflect what the Board considered a fair and just valuation, the Board changed it. (Record, p. 544.)

VIII.

From this and other evidence of the same character, supporting the finding of the trial court, that in making the valuation complained of, the Board acted in good faith and that there was no evidence that the Board acted arbitrarily or that the valuations were brought about or affected by fraud, bad faith, or other improper notices, but shows that such valuation reflects their best and honest judgment. (Record, p. 544.)

IX.

It is urged that if the value of the entire property was as fixed by the Board, the physical property was undervalued, resulting in a gross over-valuation of the intangibles.

The Railway Company, by the terms of the act, is required to report annually to the Tax Board both the assessed and actual value of its tangible property. In its statement to the Board for the year 1915, it reported the assessed value of its tangibles, including rolling stock, at $16,168,906, and the actual value of all the tangible property (except rolling stock) to be the sum of $26,026,810.78. The actual value of rolling stock does not seem to have been reported, but its assessed value, as shown by the Railway Company's report, was $2,168,906. (Record, p. 544.)

X.

On the hearing before the Board, subsequent to the preliminary valuations, as well as upon the trial of this case, a witness for plaintiffs testified to the inaccuracy of the report of the actual value of the tangible property and explained the cause for the mistake, testifying that the actual value of the tangibles was

$34,013,092.07. The Board, in fixing the preliminary valuations, valued the tangibles at $28,372,810, and adhered to this value after the hearing.

That in view of the above stated facts, there is warrant for the finding of the Board. In reaching this conclusion, it is not necessary to apply the rule invoked by defendants, that the Railway Company is bound by the statement of actual values in its report to the Board. (Record, p. 544.)

XI.

That it may be conceded that such report, the result of mistake, is subject to correction upon the hearing before the Board. The Board is not, however, bound to accept as true the evidence adduced to show mistake. It was for the Board in fixing the value, to consider the statements of assessed and actual values in the report; the evidence with reference thereto; and, in connection therewith, all other data and information at hand.

That a valuation far in excess of the value placed thereon by the Railway Company for assessment purposes in the various counties, equal to the statement of actual value in its sworn report to the Board, and in excess of the value of the entire property under the net earnings rule, contended for by plaintiffs, can hardly be deemed an arbitrary and unreasonable undervaluation. (Record, p. 545.)

XII.

That it was insisted that because the railway, through its inability to meet interest payments has been placed in the hands of receivers pending foreclosure, it has no intangible property. This may be persuasive, but is by no means conclusive evidence of the non-existence of intangible values. Such a question was raised in the Supreme Court of the United States upon a statement of facts somewhat similar to the facts of this case and that court held that a corporation may be subject to the payment of a tax on intangibles, even though the capital stock is sunk and of no value and the company utterly bankrupt. State Railroad Tax Cases, 92 U. S., 575.

That an active receivership is a recognition of the existence of intangibles. The receivers herein were appointed, not only or mainly to take into their custody and control, the physical property with a view to its preservation pending foreclosure, but they are charged with the duty of operating the road, and authorized to exercise all the rights and privileges incident and pertaining to operation. They are to keep intact the organization and continue in force traffic and other agreements and trackage rights—in a word, to conserve these and other intangibles which give life, vitality and increased value to tangibles. (Record, p. 545.)

XIII.

That plaintiffs contend that the act is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and various provisions of the Constitution of this State. With but one exception, to be presently discussed, all the objections raised were considered in Missouri, Kansas & Texas Railway Company of Texas vs. Shannon, 100 Texas, 379; 100 S. W., 138, and decided adversely to plaintiffs' contention.

Subsequent to the decision of the Shannon case, the act was amended in several particulars. It is urged by plaintiffs that, as amended, the act requires and authorizes a double taxation of intangibles, and thereby it is rendered unconstitutional. (Record, p. 543.)

XIV.

That Section 1 of the Act of 1905 provided that "every individual or association of individuals doing such business shall in addition to the ad valorem taxes on tangible properties which are now imposed upon them by law, annually * * * pay a tax * * * on their unrendered intangible assets and property, and local taxes thereon, to the counties in which its business is * * * carried on."

This section, as amended in 1907, provides that those within the act, "in addition to the ad valorem taxes on intangible properties which are * * * or may be imposed upon them * * * shall pay an annual tax to the State * * * each

year on their intangible assets and property and local taxes thereon to the counties in which its business is carried on."

The objection urged is that, under the original act in addition to the tax upon tangibles, a tax was required upon unrendered intangibles. Under the act as amended, the tax required is in addition to the tax imposed upon intangibles, and upon all intangibles, rendered or unrendered, the word "unrendered" before intangibles in the original act, being omitted in the amended act; that intangibles can, under the general law, be rendered in the several counties through which the railroad is operated and though thus rendered and taxed, are again assessed in such counties in accordance with the values fixed by the State Tax Board, and thereby doubly taxed.

The Court of Civil Appeals held that the word "intangible," where it first appears in the section of the amendment above quoted, was a clerical error, it being the manifest intention of the Legislature to there use the word "tangible." We concur in this conclusion.

Prior to the passage of the act, intangibles were required to be rendered and assessed as a part of the tangibles in the several counties. State vs. Austin & N. W. Ry. Co., 94 Texas, 530. Under the act, the valuation and apportionment of the intangible assets are within the exclusive jurisdiction of the State Tax Board. Such valuations and apportionments are certified by the Board to the county assessors, who are required by the act to list the intangibles upon the tax rolls in accordance with the findings of the Board. The act does not deal alone with valuations and apportionments, but provides a complete system or scheme of assessment.

Under the original act, the additional tax was to be imposed only upon the "unrendered intangibles." From this an inference may have arisen—very slight, however, in view of the other provisions of the act—that only intangibles unrendered in the counties were within the act. The omission in the amended act of the word "unrendered" before the word "intangible" destroys even this slight inference and makes clear and certain that the in-

tangibles of a railway company can be assessed only in the manner provided in the act, that is, upon the certified valuations and apportionments of the State Tax Board. The physicals are taxed under the general law, the intangibles under this act. The act distinctly and unmistakably so provides in the following language:

"All State and county ad valorem taxes upon all intangible property in this State belonging to any individual, company, corporation or association embraced by this chapter, shall be assessed under its provisions and not otherwise; but ad valorem taxes upon all other property of any and all such individuals, companies, corporations and associations shall be assessed as is now or as may hereafter be provided by law." (Record, pp. 545-546.)

XV.

That it is manifest that the act neither requires nor authorizes double taxation of intangibles. (Record, p. 547.)

XVI.

Another contention of plaintiff is, that there was a discrimination against them and a consequent violation of the uniformity and equality clauses of the Constitution with reference to taxation, in this: that there existed a scheme and custom in Harris County, Texas, participated in by defendants, to assess other tangibles in the county at not over 38 per cent of their actual value, while the intangible property of the Railroad Company was assessed at its full value, as found by the State Board. The answer of defendants was that, as the whole of plaintiff's property, taxable in Harris County, had not been valued for taxation at a greater proportion of its value than the other property in the county, therefore plaintiff was not entitled to any equitable relief.

It has been definitely decided in this State that where tangibles, including the tangibles of railway companies, in a county are, as a result of a settled practice or custom, systematically assessed below their true value, and the intangibles of the railway companies assessed at their true value, the railway company against which such actual value is assessed is entitled to enjoin the col-

lection of so much of the tax against it as was based upon the assessment of its intangibles at a higher proportionate value than that of other property within the State, upon the ground that such assessment is in violation of Section 1, Article 8, of the State Constitution, requiring equal and uniform taxation, and in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution, guaranteeing equal protection of the law. Lively vs. M., K. & T. Ry. Co. of Texas, 102 Texas, 545.

It is equally well settled that if the intangible assets of a railway company are assessed at their full value and its tangible assets at less than their true value and below the value of the tangible property generally of the county, and such overvaluation of intangible is equalized by the undervaluation of tangibles, as a result of which it is called upon to pay no more than others, it is not entitled to equitable relief because one class of its property is valued above another. M., K. & T. Ry. Co. vs. Hassell et al., 123 S. W., 190. Writ of error denied. (Record, p. 547.)

XVII.

That the trial court found from the evidence that the tangible properties of the Railway Company in Harris County on January 1, 1915, subject to taxation was of the value of $3,205,202.09; that this property was rendered and assessed at the valuation of $1,106,105; that the intangible values apportioned to Harris County were $603,227.44; making the total taxable values $3,809,379, which were assessed at $1,709,332, or about 45 per cent of their values and that the total properties of the Railway Company in Harris County—tangible, rolling stock and intangibles—were assessed at less than fifty per cent of their value, while other property in the county was assessed at least fifty per cent of its true value. (Record, p. 547.)

XVIII.

That under these findings of the court, which are supported by evidence the Railway Company is not entitled to the relief sought. It can not be heard to say in an equitable proceeding of this sort

that the undervaluation of its tangibles by the board of equalization is conclusive and can not be considered in determining whether there has been a discrimination against it, in violation of the uniformity and equality taxation clause of the Constitution. (Record, p. 547.)

XIX.

That the Constitution simply guarantees uniformity and equality of taxation. It does not purport to deal with the mode or manner of accomplishing this purpose, but its mandate has been satisfied when uniformity and equality of taxation has been attained. Though the board of equalization and State Tax Board are wholly independent of each other in their respective orbits of operation, their judgments with respect to the violation vel non of the constitutional provision, are interrelated; and where, as in this case, a violation of the provision is based upon the ground that intangibles have, as compared to tangibles generally, been over-assessed and the counter charge is made that the tangible of the complainants have, because of reliance upon a sworn statement filed by the complainant with the board assessing tangibles, been under-assessed, it is proper to consider the action of both boards in determining the issue. This the trial court did and as a result found that there had been no discrimination against the Railway Company and in favor of the taxpayers generally; and this finding we approve. (Record, pp. 547-548.)

BRIEF OF THE ARGUMENT.

It is the contention of respondents:

A. That no discrimination was practiced by the Board against the Railway Company in the administration of the Intangible Assets Tax Law and no discrimination resulted from the undervaluation of other property by county authorities, and if any discrimination existed the same was neither systematic nor intentional.

B. That in fixing the valuation of the Railway Company the Board acted in good faith, that they did not act arbitrarily and that the valuations were not brought about or affected by fraud,

bad faith or other improper motives, but that such valuations reflected the best and honest judgment of the Board.

COMMENTING ON THE FACTS UNDER SUBDIVISION A.

Articles 7515, 7518 and 7520, Revised Statutes, 1911, require railway companies to list "all their real and personal property" in the counties where situated "at the full and true value"; Article 7517 requires this "listing" to be sworn to. Pursuant to these statutes petitioners listed, under oath, their physical properties (exclusive of rolling stock) in all the counties in which they operated at a total valuation of "about $14,000,000" as its "full and true value." (Record, p. 234.)

Article 7525 requires petitioners, under oath, to list their entire rolling stock at the "true and full value" thereof; pursuance to this statute the rolling stock was so listed as having a value of $2,168,906. (Record, p. 234.)

The above valuations were testified to by Mr. Holder, land and tax agent for petitioners. (Record, p. 234.) We have here, then, a sworn valuation of purely "tangible properties" by appellants, themselves (who necessarily, were in the best position of anybody to classify their entire properties as between "tangibles" and "intangibles"), aggregating $16,168,906. And of this valuation of "tangibles" the members of the State Tax Board knew.

Now, the petitioners were required by the statute each year to make a sworn report to the State Tax Board showing, among other things, "*the true value* of all the tangible property owned by such company in each of the counties of the State." These reports were made for each year since 1907, and the report for the year ending December 31, 1914, showed such value of the "tangible properties" to be the aggregate sum of $26,026,810.78 (Record, p. 492), exclusive of rolling stock, which was rendered at $2,168,906 (Record, p. 492)—a total valuation of "tangibles" of $28,195,716.78. The State Tax Board took the sum of $28,372,810 as the value of the tangibles (Record, p. 494), thus exceeding petitioners' valuation of this class of property by the sum

of $204,904. This necessarily decreased the valuation of intangibles by a like amount. Petitioners filed another affidavit with the Board showing the value of their physical properties, including rolling stock, to be the sum of $28,000,000. (Record, p. 363.) Mr. Bagby, chairman of the Board, testified that the Board took these figures reported and sworn to by petitioners as the basis of the Board's finding of the value of the "physical properties." (Record, p. 363.) That these figures were reported, under oath, to the Board as the true value of the physical properties, is nowhere contradicted. The report itself is in the record at pages 184 to 185 of the record sworn to by Mr. W. J. Werner, auditor for petitioners.

This report also showed that the total value "assessed" in all the counties, exclusive of rolling stock, was the sum of $27,966,444. (Record, p. 185.) But this sum *included* the assessments on the valuation of intangibles as made for the year 1914. (Record, p. 233.) The valuation made by the Tax Board for 1914, and included in the sum just mentioned, was approximately $14,000,000. (Record, p. 234.) And this the Board knew. (Record, p. 234.) The value of "rolling stock" assessed for all the counties, as shown by the report, was $2,346,992. (Record, p. 187.) So that the "assessed value" of all physicals for 1914 was approximately $16,000,000.

The only other factor to be considered by the Board was the "entire value of the property" of appellants. The minimum "entire value" for the property shown by the record is the sum of $32,471,027.05 (the valuation of the Railroad Commission of Texas), plus $1,542,065.02 additions and betterments made since said valuation by the Railroad Commission, or an aggregate minimum value of $34,013,092.07; this is alleged in the petition of petitioners, as shown by the opinion filed in this case, and there is not a scintilla of evidence in the record to show that the value of the "entire property" is less than these figures.

The par value of all lien indebtedness of petitioners and the Railway Company, as shown in the petition, and in the opinion

of the Court of Civil Appeals, was $27,332,000; this included receivers' certificates to the amount of $600,000. (Record, p. 401.) The non-lien indebtedness (minus the $600,000 receivers' certificates just mentioned) was $3,340,867. (Record, p. 191.) The total indebtedness was, therefore, $30,672,867. The indebtedness (secured and unsecured) deducted from the minimum value shown for the "entire properties" ($34,013,092.07) leaves $3,340,-225.07. This remainder certainly represents the minimum value of the stock.

The Railroad Commission includes in its final valuations 6 per cent of the physical values found as a "franchise value." (Record, p. 382.) The petitioners, before the Tax Board, expressly refused to admit the correctness of the valuations made by the Railroad Commission. (Record, p. 153.)

The State Tax Board found the "entire value" of all the properties of petitioners to be the sum of $39,116,033. (Record, p. 365.) Petitioners nowhere in their petition or in the evidence have denied that the total value of all their properties was less than this figure. Of course, they say that the intangible value and the value of the stock is excessive, but no denial can be found of the proposition that their whole properties were worth less than the amount found by the State Tax Board. But there is ample evidence to show that their entire properties were worth at least $39,116,033. And as to this we call attention to the following facts,—shown in large by the records of petitioners,—and nowhere contradicted:

The actual money investment in "road and equipment" up to June 30, 1915, was the sum of $46,502,041.55. (Record, p. 283.) Of course, some elements of the property in which this investment was made from time to time were subject to depreciation; but other elements were at the same time subject to appreciation,—for instance, the value enhancement of the Magnolia Park and other property is estimated by Mr. Freeman for the I. & G. N. at at least $1,000,000. (Record, p. 284.) These elements of "appreciation" are not set up in the books of the petitioners, but all

"depreciation" is so taken account of, and, after allowing for "depreciation" the balance sheet of petitioners states the value of "road and equipment" to be $37,243,133.44 as of June 30, 1914. (Record, op. p. 282.) These figures are not only carried on the books of the company, but they were reported under oath to the Railroad Commission of Texas and to the Interstate Commerce Commission. Petitioners have not challenged the correctness of the figures. If the total lien and non-lien indebtedness be subtracted from this amount it leaves $6,570,266.44. If the figure (28,372.810 dollars) used by the Board as the value of the tangible properties be deducted from this sworn statement of value by petitioners, it leaves $8,870,323.44.

Mr. T. J. Freeman, who has been connected with these properties for a great many years, expresses the opinion that they are worth in excess of $40,000,000, and gives good reasons for his opinion. A good many elements of property considered by Mr. Freeman are clearly "going concern values," and in practically every important particular he is corroborated by petitioners themselves.

For instance, Mr. Freeman estimates the value of the trackage right, etc., arrangement with the G., H. & H. as worth at least $1,000,000. Petitioners stated that it "is material to the interests" of the I. & G. N. "that the terms and provisions of these contracts be kept and maintained" and that "it would be disastrous to the property to have these contracts annulled." (Record, p. 284.) Mr. Freeman estimated the value of the "seasoning" of the I. & G. N. at the minimum sum of $1,000,000. That such a value exists is admitted by Mr. Fay, general manager for petitioners, and a witness for them in this case. (Record, p. 231.) Mr. Freeman estimates that the Magnolia Park Railway (a part of the Houston terminals of the I. & G. N.) is worth at least $1,000,000 more than the amount paid for it and accounted for in the $37,243,133.44 mentioned above. That these and other terminals have a value as a part of a going concern, and a value which cannot be localized, was admitted by Mr. Fay

in this case (Record, p. 231) and by Mr. Booth, traffic manager, admitted the same thing in effect. (Record, p. 217.) Mr. Booth also testified that the I. & G. N. "has valuable franchises" in the city of Houston "worth a great deal from a traffic standpoint" which "added something to the value of the properties as a whole." (Record, p. 217.)

Mr. Fay testified that "as to express, the railroad incurs no expense outside of the equipment, the handling is done by the express companies." (Record, p. 231.) The same, manifestly, is true as to the "mail"; the petitioners received $245,373.74 from mail service and $181,999.98 from express service for the year ending June 30, 1915, and similar amounts for each year. (Record, p. 289.)

That the *stock* of the I. & G. N. Ry. Co. has a value of $5,078,000 in excess of par according to the judgment of its owners is conclusively established in this case. This additional value is represented by an interim certificate for that amount issued by the I. & G. N. Ry. Co. to the International & Great Northern Corporation, which corporation is also the principal stockholder of the I. & G. N.

The reason for the issuance of this certificate is briefly this: When the properties of the *old* I. & G. N. Ry. Co. were sold out in 1911, the purchasers thought that they were worth in excess of $36,000,000, and provided for the chartering of the *present* I. & G. N. Ry. Co. with an *authorized* capital stock of $11,500,000. (Record, p. 190.) When it was found that the Railroad Commission would not authorize the issuance of all the stock and bonds contemplated, stock was actually issued to the amount of $4,822,000, and the interim certificate was issued for the par value of $5,078,000 to cover excess of value over the Commission's valuation, and to be taken up in regular stock when the same might be lawfully issued. This item of $5,078,000 is carried as a liability upon the books of the Railway Company. (Record, p. 212.) It is found in the "comparative general balance sheet" on page — of the record as "other deferred credit items."

As to it, W. J. Werner, auditor for the company, testified as follows:

> "The witness stated that the interim certificates appeared in the statement in the deferred credit items; that is, in the statement of the figures introduced. This means a liability. The face amount of the interim certificates was $5,078,000. The item appears somewhat larger as containing other elements. Interim certificates are carried as stock is carried, and, if added to preferred and common stock, would make the sum of $9,900,000. The authorized capital stock under the charter is $11,000,000, and under the plans of the company common stock is reserved to be exchanged for the interim certificates, as the Railroad Commission may increase its valuation to that extent. The $1,600,000 of bonds referred to above is exchangeable for preferred stock, and if added to the interim certificates and other stock, would make the amount of $11,000,000, but the company has not been capitalized up to that amount, according to the witness' books." (Record, pp. 212-213.)

With respect to the reasons for the issuance of the certificate and the value behind it, the International & Great Northern Corporation stated:

> "The outstanding capital stock would be $5,000,000 of preferred stock, and $6,500,000 of common stock, making a total of $35,139,000 of capitalization upon a property which then had actual indebtedness prior to the sale in excess of $36,000,000, and had demonstrated by its earnings, operation by the Receiver, a value in excess of that amount." (Record, p. 297.)
>
> "On the question, as to the consideration moving to the company, we submit that the record in this case fully discloses an adequate consideration within the meaning of the law as defined and construed by the Texas courts." (Record, p. 203.)
>
> "Without going further into an analysis of these features of the reorganization plan, which are set forth at length in the record herein, it is respectfully submitted that in consideration given by the reorganization committee to the new company, for its securities, including the proposed issue of

> $6,500,000 of common stock, a part of which is now represented by the conditional interim certificates, was not only a valuable and adequate consideration for all the securities, including the conditional interim certificates, but exceeded in actual present value the par value of such securities." (Record, p. 304.)

In other words, if the company could have issued all of its common stock at the time, it would have been supported by an abundant and valuable consideration as between the stockholders and the company, to meet the provisions of the Texas law, as construed by the highest courts of that State.

> "That even if we consider the question of consideration as being now before us, yet the consideration given to the company by the reorganization committee under the plan of reorganization was adequate and abundant as between the company and its stockholders to sustain the issue of the entire $6,500,000 of stock provided by the articles of incorporation in accordance with the laws of Texas, as construed by its highest courts.
>
> "That the company having received from the reorganization committee this consideration, having a present actual value in property and cash adequate to sustain the issue of all the common stock authorized by its articles of incorporation, including that represented by the conditional interim certificates." (Record, p. 305.)

If it were conceded that there were mathematical or theoretical errors in the formulae, the evidence set out above would clearly indicate that such errors were not harmful to petitioners. As shown, these formulae were given out before the final hearing; appellants and others were given notice to appear and show why the *results*, towit: the valuation of the tangibles, the valuation of the entire properties, as made in the preliminary estimates were not correct; when the final hearing came on these results (no matter how arrived at) were the things considered, and as to these results the Board heard and considered all evidence and information in its possession, and thereupon allowed the results to stand in cases where it thought they were correct (after a consideration of all evidence and argument) and in cases where it

thought the results to be incorrect (after considering the evidence), it changed the preliminary estimates.

That the supposed use of the formulae in the cases of different roads worked no injustice to the I. & G. N. is made clear by the record. In practically every case the other roads were valued finally much higher per mile than the I. & G. N. The I. & G. N., with a mileage of 1106 miles (Record, p. 225), was valued by the Board at $19,743,233, or at $9713 per mile. Below is shown the mileage, the (intangible) valuation as made by the Board, and the valuation per mile for the roads which, according to petitioners, present the worst cases of discrimination against the I. & G. N. (the mileage used is that shown on pages 321-323, and the valuations are those shown on pages 305-306 of the Record):

Road.	Mileage.	Valuation.	Valuation per Mile.
T. & P.	1038	$19,717,189	$19,000
G., H. & S. A.	1331	25,629,200	19,255
Ft. W. & D. C.	454	9,764,010	21,066
G., C. & S. F.	1145	22,565,622	19,708
H. & T. C.	828	12,989,008	15,687
M., K. & T.	1119	20,144,490	18,000

In nearly every instance the other roads were valued by the Board at almost twice as much per mile as the I. & G. N.

Again, the Board *reduced* the valuation of the I. & G. N. under the previous year by the sum of $4,745,377, whereas it reduced some of the other roads' valuations by a very small sum, and in most instances increased the valuations.

The valuations of the roads named above for the two years were as follows:

Road.	Valuation, 1914.	Valuation, 1915.
I. & G. N.	$14,488,600	$10,743,223
T. & P.	20,117,955	19,717,189
G., H. & S. A.	25,297,360	25,629,200
Ft. W. & D. C.	9,991,080	9,764,010

Road.	Valuation, 1914.	Valuation, 1915.
G., C. & S. F.	19,469,592	22,565,622
H. & T. C.	12,400,650	12,989,008
M., K. & T.	19,629,750	20,144,490

(See Record, pp. 305-306.)

There is absolutely no evidence in the record by which the court can determine whether or not the valuations for any of the other roads were incorrect, too high or too low, or by which it can determine whether or not, as a matter of fact, the valuations of the I. & G. N. were not in its favor as compared with any or all of the other roads valued. But since the valuations of all are at least prima facie correct, it would appear that the I. & G. N. has no complaint as between it and the other roads.

Certainly the I. & G. N. has no complaint when a comparison is made of the values put on it and those on the G., H. & S. A., a road of about the same mileage and operating under somewhat similar circumstances as shown by the testimony of:

Thornwell Fay, a witness called by the plaintiff, testified, among other things, that he had been an assistant to the Receivers of the Railway Company since August 31, 1914 (Record, p. 225), that:

Outside of the competition factors, and those named, there are no other serious factors, except the one of the location of the road. It starts at Longview and is built at right angles across the entire drainage of the State, crossing every river in the State, except the Pecos, and is bound to be touched somewhere by every flood. Its competitors run north and south and parallel the drainage more nearly running with the water sheds.

For the I. & G. N. to meet this condition absolutely, it will be necessary to build your railroads on trestles forty or fifty feet above ground everywhere, but there are particular locations peculiarly liable to these breaks by floods, the Sabine River at Longview, the Neches River, Wells Creek, just north of Palestine, the Navasota River, the Brazos, and last April actually a track was

washed out on top of a hill, so there is no spot proof against cloud-bursts. In the Brazos bottoms there are approximately 65 to 75 miles of track in it, or the Navasota bottom.

The witness was cross examined by defendants and testified as follows: That good will was not physical and was a considerable asset, but whether the I. & G. N. had it will depend a good deal on the juries; that the road tried to please its customers and make as many friends as it could. Just how much friendliness or good will it had the witness said they had no way of knowing, but hoped they had it. But that his statement that the road had no intangible assets under the definition given was not incorrect, measured in money. The only other value which he considered entered into an intangible value was the problem of income. He was asked what difference it would make to him, as a tax payer, if his property was assessed on the wrong formula, provided it was assessed at the real value, and the witness said that as a tax payer he would insist on being assessed on the same basis as everybody else.

The witness said that he had been connected with the Sunset Central Lines a good while, including the G., H. & S. A. Directly for nine years, with the system for over thirty years, and was familiar with the location of the G., H. & S. A., and that from Del Rio to El Paso the G., H. & S. A. is much less favorably located with respect to the production of business than any part of the I. & G. N., but that the rest of the G., H. & S. A. is just as favorably located as the I. & G. N., but that from Del Rio east on the G., H. & S. A. with reference to local traffic, he thought the situation was about the same as on the I. & G. N., that the G., H. & S. A. has between 1200 and 1300 miles, but that in Texas 100 to 200 miles more than the I. & G. N., and that the intangibles on the G., H. & S. A. had been valued by the State Tax Board at $25,000,000 and the I. & G. N. at $10,000,000 in round figures, the G., H. & S. A. to be exact, being 1326 miles and the I. & G. N. 1105. That the intangible valuation would figure out for the G., H. & S. A. approximately $19,000 per mile

as against $9500 per mile for the I. & G. N. The witness considered that, taking the capital stock of the I. & G. N. at three for one, and the G., H. & S. A. at only one for one, would certainly make a discrimination; that he knew that the stock of the I. & G. N. had no such value as $300 per share, and didn't think that the G., H. & S. A. was worth $100; that he didn't think the formula worked out in favor of the I. & G. N.; that the traffic of the G., H. & S. A. is very much heavier than that of the I. & G. N., they having an enormous transcontinental traffic, the I. & G. N. nothing like the G., H. & S. A., which had steamship connections at Galveston, and sometimes three ships a week.

The witness stated that he took charge of his present position on December 15, 1914, succeeded Mr. Cunningham, recently deceased, and that there were many details he was unfamiliar with, and that the report to the State Tax Board in 1915 was made before March 1st; that the clerk, who had been in the office about fifteen years, prepared the data, and the witness sent it in, knowing very little about the correctness of the figures, and relied on the clerk, and she showed the valuation of tangibles in a mechanical way, not taking into consideration increases allowed by the Railroad Commission on account of improvements, additions and betterments, and that he had explained this to the Tax Board at the hearing in June, 1915. That the report showed $26,026,-810.78 as the Commission's valuation of physical properties, or whatever it meant, exclusive of rolling stock; whereas its valuation was $32,471,027.05, inclusive of rolling stock. Also that it had been explained to the State Tax Board that the Railroad Commission's valuation did not include certain values, that the figures for those were given them.

In the report made to the State Tax Board for 1915 is a statement of the assessed value and the true value, that is, the tangible value owned by the railroad in each county. This was made as has been explained by the witness, in his office, and not by Mr. Werner, the auditor; that as to the mileage in each county on the assessed value of the property in the county assessed locally,

these figures are substantially correct, the mileage being furnished by the Railroad Commission.

The witness said that the rolling stock for the whole road is assessed in the county where the railroad is domiciled, and proportioned on the mileage basis.

Petitioners do not complain that their property as a whole in Harris County, Texas, including tangibles and intangibles, is assessed at a higher per cent of its value than the other property in the county, but that while admitting that its tangible properties are undervalued, it claims a discrimination because of the fact that the intangible property is valued at a higher per cent than that of other property. The trial court found from the evidence that the tangible properties of the Railway Company in Harris County on June 1, 1915, subject to taxation was of the value of $3,205,202.09; that this property was rendered and assessed at the valuation of $1,106,105; that the intangible values apportioned to Harris County were $603,227.44, making the total values $3,809,379, which were assessed at $1,709,332, or at about 45 per cent of their values, and that the total properties of the Railway Company in Harris County, tangible, rolling stock and intangible, were assessed at less than 50 per cent of their value, while other property in the county was assessed at, at least, 50 per cent of its true value. (Record, p. 547.) These findings the Supreme Court says were supported by the evidence.

Thus as shown by the evidence and contended by respondents, no real discrimination was practiced either by the Board nor resulted by under-valuation by the county authorities, and even if there had been discrimination of some character, there is no evidence to show that it was either intentional or systematic.

Commenting on the Facts of Subdivision B Above.

The Supreme Court, through the Commission of Appeals, Division A, in an opinion rendered by Spencer, C. J., found (Record, p. 544) that the Tax Board disregarded the mathematical calculation and considered in assessing intangibles of all railroads all

evidence and information obtainable by them and that the valuation finally found by the Tax Board reported the best judgment of which the Board was capable under the circumstances. That in each instant in fixing the intangibles of a railroad the Board withheld its decision until the evidence was all in and that the Board was not governed by any rule of three or other mathematical formula, and if the formula did not reflect what the Board considered a fair and just valuation, the Board changed the results obtained by the use of the formula to what they considered to be a fair and just valuation obtained from other evidence. That the Board acted in good faith and that there was no evidence that they acted arbitrarily or that the valuations were brought about or effected by fraud, bad faith or other improper motives, but that the valuations found reflected the best and honest judgment of the Board.

A. P. Bagby, Jr., was called by the defendants, and on examination by the defendants, testified as follows:

That he has lived in Texas all his life, and is now Tax Commissioner of the State, and has been since January of 1915, his predecessor being A. L. Love, and that his duties in a general way were to find the intangible assets of certain corporations and make reports to the Legislature on the tax laws of the State, and that the different railroads make reports to the State Tax Board, and that the Board gathered all the information it could from all sources, and at times examined the reports filed with the State Railroad Commission and other public records bearing on the subject, and read all the text books on the subject which they could get, but had not been able to listen to any discussions on the subject. That when he first went into the office he invited two of the railway attorneys of the State of Texas, and the different ex-Tax Commissioners of the State to discuss the subject with him, towit: Messrs. Garwood and Glass and Mr. Love, ex-Tax Commissioner, and also Mr. Davey. That he had acted in good faith, and tried to get all the information he could as to what the intangible assets of the railways were and had tried to

study the statute. That in any mathematical calculation or formula, the two main factors which he had endeavored to find in order to arrive at the value of intangibles, were the real value and the physical value of the railroads; that is, the real value of the entire property as a whole, and that he had done this in the case of the I. & G. N. Railway in connection with its valuation for 1915, and that the valuation found by the Board of $39,000,000 plus represented his best judgment as to the true value of the entire properties upon all the information which he had before him, and that the facts showed that that was the proper valuation in the judgment of the court, and that he was under no coercion from any source in making that valuation, and that it was hard to get anybody to discuss the intangible matters with him, and that the valuation of the property for the I. & G. N. for 1915 took into consideration the mathematical calculation used, and that disregarding the mathematical calculation and looking only to the result, that the valuation reflects the best judgment of which the witness was capable under all the information he had, and that he saw no conduct upon the part of any other members of the Board indicating that they were not exercising their best judgment, and so he would say the same as to every one of the railroads. That the representatives of the I. & G. N. Ry. had appeared before the Board on June 18, 1915, but that these representatives did not offer the Board any facts not disclosed by the records already before the Board. That their representations consisted partly of facts and partly of arguments, with perhaps three witnesses, the auditor, the tax man, and the head of the traffic department testified, but what they said did not change the opinion of the Board, and as far as he was concerned he went into the hearing with an open mind and gave a patient hearing or tried to.

ARGUMENT.

It is the contention of the respondents:

First. That the purpose of the Intangible Tax Law is to value

and tax the entire properties of railroads, except the tangible property which is taxed in the counties where situated.

Second. That while the statute directs the method of arriving at such intangible value it invests the Board with full discretion to fix such value in any proper way to bring about a just and fair valuation of the properties, and that the finding of the Board as to such value is conclusive, unless the act of the Board is fraudulent or so arbitrary as to amount to confiscation and that the finding cannot be overthrown merely by evidence that the fact was otherwise than as found by the Board.

That the Purpose Is to Value and Tax the Entire Properties, Except Tangibles.

1. Article 8, Section 1 of the Constitution, requires that "all property in this State, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value."

Section 2 of the same article of the Constitution expressly prohibits exempting property from taxation, except such property as the Constitution authorizes to be exempted.

2. That the purpose of the intangible law is to tax the entire properties of railroad corporations is clearly shown by the legislative history of the taxation of railroads, as is set out in the defendants' answer. (Record, p. 58 et seq.)

3. That this is the purpose of the law is shown by the language of the law itself. The tax is named a tax on "intangible assets and properties." Sections 5, 6 and 7 of the act give to the Board full power to compel attendance of witnesses and to require the production of books, records, etc., in order to get full information as to the nature and extent of the properties and the volume of the business of the corporation, etc.

Section 10 of the act requires each year of the corporation a full statement, not only of the amount of its bonds and other indebtedness and of its capital stock and its value, but also a statement of the amount of business done by the corporation, and statement of the total gross receipts of the corporation, a statement of

every lien and encumbrance against the property of the corporation and statement of all the earnings of the corporation, of all interest on investments, of all rents, fruits, revenues and receipts from every source, and a statement of the mileage owned by the corporation, etc., showing a purpose to furnish the Board for its guidance in valuing the property full information as to every kind and character of property owned by the corporation and as to the nature and volume of the business done by it.

By Section 14 the Board is directed to fix the true value of the *"entire property"* of the corporation, a basis for this calculation being suggested, but not made mandatory. By the same section the Board is directed to deduct from this value of the entire property of the corporation the value of the tangible property, the result to be taken as the value of the intangible property for taxation under the law. It naturally follows from this direction to value the entire property and to deduct from such value the value of the tangible property that the purpose of the law is to reach for taxation every kind and character of property owned by the corporation. It certainly is clear that the purpose of the law is not as complainants seem to assume to define the intangible properties as the difference between the value of the bonds and stock and the value of the tangible properties. It is clear that this is merely a method which the Board is directed to follow in arriving at the value of the intangible property, for the law expressly provides that this method need not be followed by the Board, but that it may follow any other method which in its opinion will bring about a just, fair, equitable and lawful valuation and apportionment of such property.

Section 21 of the act exempts from the gross receipts tax those corporations which pay taxes on their intangible properties, showing that the value of the occupation of the corporation is included among its other properties as an intangible asset.

4. The Supreme Court of Texas has construed this law as intending to tax the entire property of the corporation, of whatsoever character, in the case of M., K. & T. Ry. Co. vs. Shannon, 100 Texas, 379.

Judge Gaines, on page 390 of the opinion, discusses the case of the State vs. A. & N. W. Railroad Company, 94 Texas, 530, and shows that it was held in that case that the intangible assets of a railroad company under the law then existing should be assessed by the county assessors of the respective counties, by adding to the value of the tangible property so listed the intangible values. He there says:

> "We recognized then that the methods of assessing the intangible values of a railroad company provided by the laws then in force was extremely crude and poorly calculated to accomplish the proposed object. In the present law the Legislature has attempted to correct this and to provide a mode by which the intangible values of the line or lines of the railroad company in operation may be assessed *as a part of the whole property* of the railroad company and apportioned to the respective counties through which such line or lines are located."

In the same connection he further says:

> "The intangible values of a railroad company are the values of the railroad property above the value of its physical assets, which intangible values ordinarily result from the profits of its business as actually conducted."

This is a positive construction of the Intangible Tax Law, as meaning to reach all the values of the whole railroad properties over the value of its physical properties and assets. It is true that the law construed by the Shannon case was the law as enacted in 1905, but there is no change by the amendment of 1907 in that part of the law which shows the property that is to be taxed and there is no change in the direction as to the method of arriving at the value of this property, except that by the law of 1905 it was the assessed value of the tangible property which was deducted from the value of the entire property, whereas, by the amendment in 1907 the true value of the tangible property is deducted. In neither law, however, is the method of calculation made mandatory. No reason is shown by the amendment of 1907 for the change in deducting the true value of the tangibles in-

stead of the assessed value. It is noteworthy that what is known as the full rendition law was passed in 1907, at the same session of the Legislature as the amendment to the Intangible Tax Law, and both of these laws were approved on the same day by the Governor.

General Law of 1907, pages 462-469.

It is our construction both of the Intangible Tax Law of 1905 and of the Intangible Tax Law of 1907 that the purpose was to tax all property of every character owned by the corporations affected. It is doubtless true that the Legislature in amending the law in 1907 assumed that the tax assessors of the different counties and the boards of equalization of the different counties would perform their duties as enjoined upon them by the full rendition law, and would assess the tangible property of the various railroads at their true value and that it would therefore accomplish the purpose of the Intangible Tax Law to reach all the property of railroad corporations by deducting the true value of the tangibles from the value of the entire properties.

5. That the purpose of the Intangible Tax Law is to reach all properties of railroad corporations is shown by several Federal cases construing similar laws of different States.

Western Union Telegraph Company vs. Norman, 77 Fed., 13.

This case construed a Kentucky law levying an annual tax on the "franchise" of railroad and other corporations. It provided for a valuation of the franchise by a State board of valuation. In order to assist the board in determining the value of the franchise each corporation was required annually to file with the board a statement showing its gross receipts, the value of its properties, stocks, debts, etc.

The law directed that the board, in arriving at the value of such franchise should fix the value of the capital stock of the corporation and should deduct therefrom the value of its tangible property in the State. The contention was made that the purpose of this law was to levy against an instrument of interstate commerce a tax on its privilege or right to do business in the State, but the court construed the law as imposing a tax on the

intangible property of the corporation; that is a tax on all the property of the corporation of whatsoever kind, exclusive of the tangible property, saying:

> "As we construe the law the Legislature intended that the corporations, companies and associations named in the various sections should be treated as an entirety and taxable as such; and in using the words "capital stock" it intended to include all of the property of these corporations, companies and associations and to have all the property valued as an entirety."

In the opinion the court gives the following definition of the words "intangible property":

> "Intangible property in the revenue law not only includes the value of franchise, but also *any other property* rights which the companies or the associations may own and which are taxable."

This case was appealed to the Supreme Court of the United States, but was "dismissed with costs, per stipulation."

17 Supreme Court Reporter, 1002; 41 L. Ed., 1182.

Pittsburg, Etc., Railroad Company vs. Backus, 154 U. S., 421.

This last named case involved the law of the State of Indiana taxing railroad corporations. The law provided that all property within the jurisdiction of the State not expressly exempted should be subject to tax. It expressly declared that the property of the railroad corporations was divided into two classes, "railroad track" and "rolling stock." The law further provided for the filing with the State Auditor of a statement very similar to the statement required to be filed under our law, and the board was directed to assess the railroad property denominated in the act as "railroad track" and "rolling stock" at its true cash value. In discussing the purpose and scope of the law and the property intended to be taxed by it the court said:

> "Counsel sought in argument to narrow the meaning of the words "railroad track" and "rolling stock" as though the two did not include the entire railroad property; but evidently the Supreme Court of the State construed, and as we think, properly, the two terms as embracing all which goes

to make up what is strictly railroad property. By Section 3 of the act, it is provided that all property in the State shall be subject to taxation unless ex ressly exempted. By Section 4, that when the property of a corporation is taxed to the corporation the shares held by individuals shall not be subject to taxation. There is in terms no exemption of any railroad property, or any part thereof; and there is no provision of the tax law reaching that which is strictly railroad property, except as embraced within the two terms, "railroad track" and "rolling stock." Obviously, it was assumed by that court, though the matter is not discussed in the opinion, that by these two descriptive terms the Legislature, carrying out the declared purpose of subjecting *all property* within the State to taxation, not expressly exempted, *meant to include all the property owned or used by the railroad companies in the operation of their roads, and which may fairly be called "railroad property."* And when the statute provides that such property shall be assessed at its "true cash value," it means to require that it shall be assessed *at the value which it has, as used, and by reason of its use."*

154 United States Reports, pages 429 and 430.

It thus appears that in order to accomplish the purpose of the law and the mandate that all property shall be taxed the Supreme Court of the United States construed the words "railroad track" and "rolling stock," used in the Indiana law to include all property owned by the railroad company of whatsoever character. These words are not nearly so broad as the words "intangible assets and properties," used in our Texas law, and the same mandate that all property shall be taxed appears in our Constitution.

State Railroad Tax Cases, 92 U. S., page 575.

The law involved is a law of the State of Illinois, which levied a tax on "the capital stock including the franchise over and above the assessed value of tangible property." This law also provided for a statement of the receipts, stocks, bonds, mileage, etc., of the railroad company to be filed with the Board, as required by our law. The Board adopted a method of ascertaining the value of the capital stock, including the franchise, which method provided for the finding of the market or fair value of the capital stock

and the market or fair value of the debts of the corporation and the deduction from the total of these items of the assessed value of the tangible property. In discussing the purpose of the law Justice Miller said:

> "The theory of the system is manifestly to treat the railroad track, its rolling stock, its franchise and its capital as a unit for taxation, and to distribute the assessed value of this unit according as the length of the road in each county, city and town bears to the whole length of the road."

He refers to the capital stock and franchise as an element of property for taxation and describes it as "the value of the right to use this tangible property in a special manner for the purpose of gain."

He discusses the rule adopted by the Board for valuing the property and says that while it may not be the wisest mode of doing complete justice in the difficult matter "we confess we have on the whole seen no scheme which is better adapted to effect the purpose, so far as railroad corporations are concerned of *taxing at once all their property.*" This is a direct and positive construction of the law taxing the "capital stock and franchise" of a corporation as a law intended to tax at once all the property of the corporation.

A determination of the question at issue involves a question of the taxing power of the State and the plan or scheme devised by the Legislature for the due exercise of this power.

Section 1 of Article 8 of the Constitution of Texas, among other things, declares:

> "All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law."

Patently, this constitutional mandate required that every element of property by whatever name known, whether it be called "tangible" or "intangible," or mixed "physical" or "meta-physical," must bear its due proportion of its burden of the govern-

ment. If, when the requests of the labors of all the taxing officers of the State are added together and by complaint assessments made under the scheme devised by the Legislature therefor, a result is reached whereby all the property of any individual or corporation is subjected to taxation by whatever name the property may be known, this result can furnish no basis of complaint because constitutional command quoted was the declared will of the sovereign in the exercise of the most fundamental of its powers generations before complainants were born and years before the property which they now own came into their possession. Has this result been reached? The determination of this question required a brief question of the plan adopted by the Legislature for the ascertainment of the value of the property of corporations of the class to which complainants' company, brings.

Bearing in mind always, that it was under the constitutional duty to require all property of whatever description to be assessed, the Legislature has from time to time enacted a general scheme complete in itself, and well calculated to reach this result, and it is improper in the question of the result to question a loan.

One element of railroad property consists of steel in the rails and the wood in the ties, the iron in the spikes that holds the rails to the ties, the ballast in the roadbed, the land in the right-of-way, the material in the structure of the trestle, the iron and wood and other material in the cars and locomotives constituting the rolling stock, the land, the material and the buildings of stational and terminal facilities, shops and tools.

This element of value is supposed to be reached by the provisions of Chapters 11 and 12, Title 126, Revised Statutes, 1911. As the basis of the assessment of this element of railway property, the company is required to deliver a sworn statement to the assessor of each county in which a part of its road is located, a sworn statement showing "paragraphs 1, 2 and 3 of Article 7554, Revised Statutes, 1911." Now for the purposes of this assessment, the county assessing officers are required to value the

property as it appears on the ground and of itself, but faithful as may be public officials, and honest as may be those making valuations, it must happen when human nature and force of motives are considered, that elements of this property will escape taxation because of undervalues or omission from assessment. Furthermore, this purely "physical" property has a value apart from and in addition to the value placed upon it by the county officials, and in addition to its value when considered by facts, "the sleepers and rails of a railroad, or the posts or irons of a telegraph company, are worth more than the prepared wood and the bars of steel or coil of wire from their organic connections with other rails or wires and the rest of the apparatus of a working whole." Fargo vs. Harpe, 193 U. S., 490. It has a value as a part of a going concern, it has a value because it is operated under and by reason of a valuable franchise entitling the owners of the property to collect tolls and charges for its use from the public, and because of the excess of the property tax and in the operation of it, the owners in fact, exercise a portion of sovereignty. The railroad being a public highway and the right to collect charges for the use as a public highway belonging in the first and last analysis, to the sovereign.

As it is true of the truly physical property, it is also true of this franchise value when considered by itself, that it has an element of value in addition to its value per se, this additional value comes about from the fact that it is a part and an element of a going concern, pursuing a profitable occupation and altogether constituting an enterprise involving elements of sovereignty.

It came about, therefore, that in order for the constitutional mandate to be carried forward it was necessary to devise some plan whereby all the elements of all the different species of this property might be subjected to taxation in addition to taxation upon the assessment of each of the elements mentioned when considered alone.

It was the purpose of the Legislature, therefore, in the enact-

ment of the "intangible" tax law subject to taxation of elements of property by whatever name called and whether defiant or not and which under the other plans of assessment were not reached. All these escaping elements of taxable property under the other scheme are sought to be subjected to taxation under the general name of "intangibles" by the purposes and provisions of the statute. After a going concern be granted any given entire value as to property, no man can tell exactly where the value of purely "physical" stops and the value of "intangibles" begins. It also being true that the valuation of the purely "physicals" being left to a large number of boards and individuals and being based in the beginning upon estimates of value fixed by corporations themselves, who are to be subjected to the burden of paying the tax, some elements of the purely "physical" values of the property must escape; and it is the purpose of this act, among others, to subject these escaping elements to taxation.

Now bearing in mind the purposes in view, and the difficulties to be encountered in the construction and administration of an equitable tax system, the Legislature in this act vouchsafed to the Tax Board wide discrimination, and charged the Board with the duty of exercising this discrimination for the purpose of carrying out and achieving the broad result in mind.

In order that no element of property might escape, the Legislature suggested a plan of calculation to be followed by the Tax Board,—"in so far as the other evidence and information adduced before, said State Tax Board does not make it appear to the members of said Board to be improper or unjust to do so,"—and that plan is the following:

The Board must find the *true value* of the *entire property* (and it will be noted in this connection that the Board is not required to take the value fixed upon any element of the entire property by any other individual or board). Now as the basis of this *true value* of the entire property, it is suggested that the Board shall first add together the *true value* "of all shares of stock" and the aggregate market of *true value* of all lien indebtedness.

Now from the *true value* of the entire property as found above, the Board shall deduct the *true value* of all the "tangible" property, it will be noted here also that the Board is not required to take the estimate of any other individual or board as to this value, but the Board is expressly authorized "if it shall believe that some method of calculation other than that" suggested is necessary in order to produce just and lawful results, to set that method aside and to "follow the method of calculation which it believes best calculated under all circumstances to bring about a just, fair, equitable and lawful valuation and a portion of such property." It will be noted here that the terms "such property" refers back not only to the general term "intangible" but to the terms "true value of the entire property" and "the true value of all the 'tangible' property,"—emphasizing the purpose of the Legislature to conclude under the general term "tangible" every element of the corporation property that had not been subjected to taxation by the county officials.

It becomes apparent, therefore, that if, when the total assessed valuation of "purely physical" by the various counties is added to the assessment of valuation under the general term "intangible" the result does not exceed the real value of all the railroad property of the company irrespective of its division and the elements regardless of terminology, due process has not been lacking, but on the other hand the constitutional command that all property shall be assessed in proportion to its value, has been obeyed.

The Board in its calculations and under the methods chosen by it, found the entire value of the railroad's property to be $39,116,033. This was a finding of fact, to the effect that the company possessed that much property in the State, subject to taxation, and which, of course, ought to be taxed; under the method pursued by it, it found that only $28,375,810 of value of this property had been subjected to taxation by the action of various county officials. Now if it be true that the "whole property" is in fact worth $39,116,033 and only $28,372,810 worth thereof has

been subjected to taxation, if "physicals," then the plan reached of Section 1, Article 8, of the Constitution of the State requires, $10,743,223 more of value be placed upon the tax rolls. The county officials having acted, there remains no other way to get this escaping property upon the roll, except by the action of the State Tax Board. The purpose of the statute, and its effect, if faithfully administered, is, therefore, to cause to be assessed all the property that is not otherwise subjected to taxation; any method adopted by the Board that will produce this result cannot operate to confiscate property or take it without due process of law because manifestly this is the result plainly commanded by the Constitution.

The justice and wisdom of this purpose and effect, in the statute, is illustrated somewhat by the bill itself. In paragraph 27 it is alleged that the Railroad Commission has valued the Railway Company's "physicals" at $32,471,027.05, and that it has at least an additional value of the "physicals" of $1,542,062.02, or a total "physical" value of $34,013,092.07, but this same "physical" value is assessed by all the counties at only $28,372,810, leaving only $5,640,282.07 of property wholly untaxed and which would remain untaxed unless covered by the general term "intangibles"; this $5,640,282.07 owes tribute to the State just as much as any other equal amount of property in the State,—and it must be immaterial to the Railway Company whether it is taxed under the term "physical" or "metaphysical" because it is plain that it must be taxed in order for the plain command of Section 1, Article 8, to be obeyed. The necessity of this construction of the purpose of the statute may be illustrated by other facts and conditions set up in the answer.

The "Book Cost" of the properties of the Railway Company,—according to the evidence submitted by the company and the Receivers to the Railroad Commission,—for the purpose of securing higher rates, amounts to the sum of $43,818,430.79. This may not be, and, of course, is not, a conclusive test of the value of the property as a whole, but is one criteria worthy of consider-

ation. Accordingly, the Tax Board's assessment, plus the combined assessments of the various county officials, allows $4,701,397.79 worth of property to escape,—or about 10 per cent of the whole. For taxation purposes, therefore, the State, through its various taxing officials, has undervalued the property in favor of the complainants, instead of overvaluing. See Werner's Exhibit 8.

While the Law Directs a Method of Arriving at a Value of the Intangible Properties It Invests the Board with Discretion in Fixing Such Value in Any Just Way. Its Findings as to Such Value Are Conclusive Unless the Acts of the Board Are Fraudulent and the Findings Cannot be Overthrown by Evidence that the Value Was Otherwise Than as Found by the Board.

1. The language of the law clearly leaves the question of value to the discretion of the Board. The first portion of Section 14 of the law provides a method of calculation which the Board may take as a basis. The Board is merely directed by this section to use such basis in the event other evidence or information adduced before the Board does not make it appear to the members of the Board that it will be improper or unjust to use such basis. The last paragraph of Section 14 of the law provides that it shall be the duty of the Board "to make use of and consider all evidence which may be put before it and all material facts at its command, and if it shall believe that some method of calculation other than that specifically prescribed in this act is necessary in order to produce just and lawful results said Board shall follow that method of calculation which it believes best calculated under all the circumstances to bring about a just, fair, equitable and lawful valuation and apportionment of such property."

No language could be used more clearly showing a purpose to

leave to the discretion of the Board the method of calculating the value of the intangible assets.

2. It is obvious from the nature of the property sought to be reached by the law that no arbitrary method of calculation could be prescribed, but that such matter must necessarily be left to the discretion of the officers upon whom the duty is imposed. The very word "intangible" shows that the value of the property is difficult to measure. It is clear also that the privilege or right to enjoy the occupation is a valuable property right and incapable of exact valuation. The value of the properties as the part of an entire system and as a going concern, its leases, terminal facilities and valuable contracts must be considered and all of these are difficult to value.

3. The authorities sustain the foregoing proposition.

State Railroad Tax Cases, 92 U. S., 575.

As above explained, this case involved a law which by its language levied a tax on "the capital stock, including the franchise, over and above the assessed value of the tangible property." This law, as has been shown, was construed to tax all the properties of the corporation. The Board adopted a plan of arriving at such value similar to the basis prescribed by the Texas law. One of the railroad corporations in that case was insolvent and in the hands of a receiver. It was unable to pay any interest on its bonds and its capital stock was of no value. This condition of the railroad is stated as a fact by the court, on page 606 of 92 U. S. It was contended by the railroad corporation that its entire franchises and property were not worth more than $1,088,749, and that its net earnings had never been sufficient to pay the interest on its debt. (See page 590.) Nevertheless, the capital stock and franchise of the corporation, exclusive of its tangible property, was valued by the Board at $2,003,415. It was contended in that case, and also in this case, that the action of the Board in thus valuing the property was contrary to the Fourteenth Amendment of the Federal Constitution, since the capital

stock was of no value, the company being insolvent, etc. In response to such contention the Supreme Court said:

"This sounds plausible; but it is nothing more. Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable,—there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value,—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling stock, and other tangible property? Is it supposed by anyone that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. *By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose.*

"It is this *franchise* which the Legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debt, who shall say that it is not worth $2,000,000? and who shall say that such is not the real value now of this franchise?"

The complaint was made in the bill that the Board acted improperly in arriving at the value of the property to be taxed, in that without notice to the complainant it increased a number of the estimates of value reported to it by the railroad company under the statute. In answer to this contention the Supreme Court said:

> "As we do not know on what evidence the Board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the circuit court, should be better, or should be substituted for that of the Board, whose opinion the law has declared to be the one to govern in the matter."

As further showing that the matter of valuation should be left to the Board and not interfered with by the court we find the following in the opinion:

> "As we have seen no evidence that the rule by which railroad property is taxed is not uniform in its action on all the railroad companies of Illinois, we can perceive no opposition to the Constitution of the State in that rule.
>
> "But suppose it were otherwise; perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised, must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence on which human judgment is founded. Tappan vs. Merchants' National Bank, 19 Wall., 504; Weber vs. Renhard, 73 Penn. St., 373; Commonwealth vs. Savings Bank, 5 Allen, 247; Allen vs. Drew, 44 Vt., 174."

To the same effect the court further said:

> "It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right of an injunction *in* a court of equity. Mooers vs. Smedley, 6 Johns, Ch. 27; Dodd vs. Hartford, 26 Conn., 239; Green vs. Munford, 5 R. I., 478; Messert vs. Supervisors of Columbia, 50 Barb., 190; Dow vs. Chicago, 11 Wall., 108; Hannewinkle vs. Georgetown, 15 Wall., 548."

As showing that the action of the Board ought not to be disturbed except in a very clear case and that the courts should be slow to interfere with the collection of State taxes the following appears in the opinion:

> "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. * * * These reasons, and the weight of authority by which they are supported, must always incline the court to require a clear case for equitable relief before it will sustain an injunction against the collection of a tax, which is part of the revenue of a State."

Ohio Tax Cases, 232 U. S., 576.

The law construed by these cases is the Ohio tax on the gross receipts of railroad corporations, being called a franchise tax. In this case as to one of the railroads the facts showed that the

earnings were insufficient to pay interest on investments and that the earnings were not even sufficient to pay operating expenses, and for this reason it was contended that the franchise was of no value and that no tax should be paid on it, just as it is in this case contended that the I. & G. N. Railway Company has no intangible assets, for the reason that it is in the hands of receivers, and its stock is in process of elimination. The answer of the Supreme Court to this contention, speaking through Justice Pitney, is as follows:

> "Upon this point we are content to refer to, without repeating, the language employed by Mr. Justice Miller, speaking for this court in the State Railroad Tax Cases, 92 U. S., 575-606."

Pittsburg, Etc., Railroad Co. vs. Backus, 154 U. S., 421.

As has been shown, the law involved in this case levied a tax on all the property of railroad corporations, though defining it as "railroad track" and "rolling stock." The valuation fixed by the Board on the property for the year 1891, being the valuation sought to be enjoined, was $22,666,470 as against a valuation of $8,538,053, for the year 1890.

As showing the difficulty of measuring the value of railroad properties the court quoted with approval from a Tennessee case as follows:

> "The value of the roadway at any given time is not the original cost, nor, a fortiori, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad

track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

The substance of the testimony attacking the valuation as fixed by the Board is as follows:

"The bill of exceptions discloses these proceedings on the hearing: The plaintiff offered the record of the action of the State Board for the year 1890, showing an assessment, as heretofore stated, so much less than that of 1891, which record was rejected as irrelevant and immaterial. Thereupon the plaintiff offered the record of the proceedings of the Board in 1891, which was admitted. This recited the appearance of the plaintiff by its officers, and that they were heard as to the proper valuation. It also contained a table by counties of the assessment as made by the Board, closing with this certificate:

"Making liberal allowances for all proper deductions, the State Board of Tax Commissioners has fixed the *values of the respective railroads* and parts of roads within the State of Indiana for taxation on the first day of April, 1891, as hereinbefore set forth.

"In arriving at the basis for the estimate of said values the Board has considered the cost of the construction and equipment of said roads, the market value of the stocks and bonds, and the gross and net earnings of each of said roads, and all other matters appertaining thereto that would assist the board in arriving at a true cash value of the same.

"The return made by the plaintiffs to the Auditor of State for the year 1891, in accordance with the requirements of the statute, was also given in evidence, which return was upon a blank furnished by the auditor, and shows an aggregate valuation of about $8,000,000. This return was sworn to by the general manager and secretary of the company. The second vice president and general counsel of the plaintiff was called as a witness, and, after testifying to his familiarity with the property, and its value, was asked the value in 1890, but, on objection, this testimony was ruled out. He was permitted, however, to give testimony as to the value in 1891, and his answer fixed that value in the aggregate at $8,538,053,

the same value that was placed upon the property by the State board in 1890. He was asked to state the average cash value per mile of the company's property in Indiana, and in the other States into which the company's road extended, treating the portion in each State as constituting a unit, separate and distinct from those of the portions in the other States, but an objection to this was sustained, and the testimony offered ruled out. He then testified as to the terminal facilities in the cities of Chicago and Pittsburgh belonging to the plaintiff, and their great value, and the absence of terminal facilities of any particular value in any of the cities in Indiana. He was then asked if the plaintiff owned any rolling stock which was used exclusively in any one of the five States in which it did business, but this question was ruled out. In response to further questions he testified that the plaintiff had no rolling stock used exclusively within the State of Indiana for special purposes. Certain questions were also asked as to the notice or knowledge which the plaintiff had of the determination made by the State board in 1891 as to the valuation, but we have heretofore held that it is immaterial whether it had any notice thereof after the decision and prior to the adjournment of the board. The assistant engineer of the plaintiff was also called as a witness, and producing a written statement which he had presented to the State board prior to its determination, which statement goes at length into the mileage in the different States, the gross earnings, per cent of earnings, and the value of the track, testified that the facts in such written statement were true. Another witness, the assistant comptroller of the plaintiff, was asked what per cent of the gross receipts of its Indiana business was derived from commerce, beginning and ending wholly within the State and what from interstate business; but, on objection this testimony was ruled out. The Secretary of State, who was a member of the State board, was also called, and testified that the members of the board did not make an official examination or inspection of the railroad track and rolling stock of the plaintiff, being personally acquainted therewith; that they did not summon before them, or examine under oath, any person or persons acquainted with the true cash value of the property. The plaintiff also offered the return made by the Terre Haute and Indianapolis Rail-

road Company to the auditor of State for the year 1891, prepared upon the same form as that upon which the plaintiff's return was made, but it was ruled out as irrelevant and immaterial, as well as the action taken by the State board in respect to the valuation of the property of such road. This was, in substance, all the testimony offered by the plaintiff.

"The defendant simply called the Secretary of State, who testified that in assessing the plaintiff's property no assessment was made, except upon the railroad track and rolling stock of plaintiff within the State, and no assessment was made of any property of value outside the State."

It thus appears that no evidence whatever was introduced to sustain the finding of the Board, except the testimony of the Secretary of State to the effect that the property assessed was the railroad track and rolling stock of the corporation within the State. The railroad company introduced positive testimony to the effect that the property was worth about $8,000,000. In view of this evidence the Supreme Court concluded that the valuation of the Board could not be disturbed, saying:

"Upon this testimony the decision of the court was that there was nothing to impeach the assessment made by the State board, and in this conclusion we concur. The true cash value of the plaintiff's property in the State of Indiana in the year 1891 was a question of fact, the determination of which for the purposes of taxation was given to this special tribunal, the State board. *Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.* Here the question determined by the State board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board. *It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determination.* It is not, however,

contended by counsel that there was any actual fraud on the part of that board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact bore, and did so with the purpose of making the plaintiff bear a larger share of the burden of the support of the State government than it rightfully should. The contention is rather that the board made a grievous mistake in placing so high a value, and that it took into consideration property outside of the State, and gave to the property within a value partly deduced from that without the State. The testimony, however, does not sustain this contention."

We call special attention to the fact that while the Supreme Court commented upon the remarkable and unreasonable increase in the valuation of the railroad to nearly three times its valuation for the preceding year it declined to disturb the action of the Board, for the reason that no fraud was either alleged or proved on the part of the Board in fixing the valuation.

Maish vs. Arizona, 164 U. S., 599-610.

In this case cattle were valued for taxation by the Tax Board of the territory at $7.42, whereas the testimony introduced showed that they were worth from $6.00 to $6.50 a head. This valuation was attacked as "grossly unfair and that there was a fraudulent discrimination in favor of the Southern Pacific Railway Company" in that the property of the railroad company was assessed at much less than its value. In answer to this attack the Supreme Court said:

"There is nothing tending to show that the board, in fixing the value of cattle at $7.42, acted fraudulently or with any wrongful intent, or that that valuation was not the result of its deliberate judgment upon sufficient consideration and abundant evidence, and it would be strange, indeed, if an assessment could be set aside because a single witness is found whose testimony is that the valuation was excessive. No assessment could be sustained if it depended upon the fact that all parties thought the valuation placed by the assessing board was correct. Something more than an error

of judgment must be shown, *something indicating fraud or misconduct.* Neither is the fact that an officer of the railroad company came before the board and declared its willingness to pay taxes on a certain valuation and its intention to resist the payment of taxes on any higher valuation sufficient to impute fraudulent conduct to the board, although it finally fixed the valuation at the sum named by the railroad company. It appears from the testimony of one of the members of the equalization board that it was guided largely by the valuation placed in other States and Territories upon railroad property, and that from such valuation, as well as from that given by the railroad company, it made the assessment at something like the average of the valuation of railroads in the various States and Territories named. It is unnecessary to determine whether this board erred in its judgment as to the value of this property, whether it would not have been better to have made further examination and taken testimony as to the cost of construction, present condition, etc. *Matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its judgment cannot be overthrown.* Pittsburgh, Cincinnati, etc., Railway vs. Backus, 154 U. S., 421-435."

Willoughby vs. Chicago, 235 U. S., 45.

A portion of the complainant's property was taken for public improvement and an assessment was made against his other property for benefit conferred by the improvement, this assessment being greater than the damages accrued him for the property taken. The complaint was that this amounted to a taking of property without due process of law, in that he had been deprived of property without being paid for it. The Supreme Court thus disposed of this complaint:

> "It is objected that less was allowed for the land taken than was charged for the benefit, but it is quite possible that the benefit was greater than the loss and we cannot inquire into the fact."

Hibben vs. Smith, 191 U. S., 310.

This case also involved an assessment for public improvement.

The court held that the amount of the benefit resulting from the improvement was a question of fact, that the decision of the board fixing this amount was final and that no Federal question arose.

Adams Express Co. vs. Ohio, 165 U. S., 114-229.

In this case a tax was levied by the State of Ohio on all the property of express companies and other corporations in the State, report was required of the total gross receipts within and without the State and the length of the line within and without the State. The Supreme Court following the case of Pittsburgh, etc., Railway Company vs. Backus, 154 U. S., 434, held that the whole property of the express company, both within and without the State, might be valued for taxation as a unit and the proper proportion of its property taxed by the State, even though by such tax interstate commerce was incidentally affected. The contention was made in the case that the valuation made by the board was excessive. In answer to this contention the Supreme Court said:

> "We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that 'whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.' Pittsburgh, Cincinnati, etc., Railway vs. Backus, 154 U. S., 434; Western Union Telegraph Co. vs. Taggart, 163 U. S., 1."

Kelly vs. Pittsburg, 104 U. S., 78.

In this case the assessment of the property was attacked because "enormously beyond its value." The Federal question was that this amounted to a violation of the due process clause of the Constitution. The court held that this was a question of fact into which it could not inquire, saying:

"The distinct ground on which this provision of the Constitution of the United States is invoked is, that as the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. *Whether this be true or not we cannot here inquire.* We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject, that it is only necessary to refer to those decisions without a restatement of the argument on which they rest. State Railroad Tax Cases, 92 U. S., 575; Kennard vs. Louisiana, id., 480; Davidson vs. New Orleans, 96 id., 97; Kirtland vs. Hotchkiss, 100 id., 491; Missouri vs. Lewis, 101 id., 22; National Bank vs. Kimball, 103 id., 732."

Davidson vs. New Orleans, 96 U. S., 97.

This case contains a very interesting discussion by Justice Miller of the due process clause of the Federal Constitution, among other things, he says:

"There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." * * * "As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us: That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the

charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." * * * *"It is also said that part of the property of plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so."* * *

This language clearly indicates that under the due process clause the Federal courts cannot inquire into the value of the property assessed or into the details of the assessment.

In the case of Southern Railway Company vs. Watts, 67 L. Ed., 199, a similar question was considered by the Supreme Court of the United States, Justice Brandeis delivering the opinion of the court. This was a case in which various railroad companies brought a suit in the Federal District Court of North Carolina seeking to enjoin the taxing officials from collecting the ad valorem taxes for the year 1921, imposed for local purposes and the franchise tax imposed for State purposes. The property taxes were assailed on the ground that as assessed they violated the equal protection clause, the due process clause and the commerce clause of the Federal Constitution and the uniformity clause of the State Constitution. Under the Constitution of the State of North Carolina taxation of real and personal property must be uniform and ad valorem according to its true value in money. In all of the assessments made prior to 1920 nearly all classes of property had been grossly undervalued, the undervaluation varying greatly in degree. Under the Acts of 1919 provision was made for new and fundamentally changed valuations of all property at full values, the valuation of real estate to be made by county officials and that of railroad property by a State board, the taxes later to be allocated to the counties on a mileage basis, the assessments to become effective only when approved by the Legislature. Revaluations were made under this act and the as-

sessments of railroad property on the average doubled as compared with previous assessments and real estate quadrupled. By an act of the Legislature of 1921 provision was made for the revaluation of real estate by the county boards and railroad property by the State boards. Proceeding under that act reductions were made in sixty-seven counties varying from one to fifty per cent of the valuations of real estate, but no change was made in the valuation of any of the railroads applying for same save one. The appellant contended that the property tax as assessed was obnoxious to the Federal Constitution because it denied equal protection of the law in that the railroads were discriminated against, because relief was allowed to the owners of real property and denied the railroads, and the court said:

"The claim that plaintiffs have been denied equal protection of the laws appears to rest more largely on the charge that discrimination has been practiced against them in administering the tax laws. It is urged that county boards proceeding under Section 28a of the Act of 1921, reduced real estate valuations quite generally, but that the State board, acting under Section 28g, refused to reduce the valuation of any railroad except that of the Norfolk & Southern. The rule is well settled that a tax payer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class, belonging to others. Raymond vs. Chicago Union Traction Co., 207 U. S., 20, 52 L. Ed., 78, 28 Sup. Ct. Rep., 7, 12 Ann. Cas., 757. This may be true, although the discrimination is practiced through the action of different officials. Greene vs. Louisville & I. R. Co., 244 U. S., 499, 61 L. Ed., 1280, 37 Sup. Ct. Rep., 673, Ann. Cas., 1917E, 88. But, unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause. Sunday Lake Iron Co. vs. Wakefield Twp., 247 U. S., 350, 353, 62 L. Ed., 1154, 1156, 38 Sup. Ct. Rep., 495; Chicago, B. & Q. R. Co. vs. Babcock, 204 U. S., 585, 51 L. Ed., 636, 27 Sup. Ct. Rep., 326; Coulter vs. Louisville & N. R. Co., 196 U. S., 599, 40 L. Ed., 615, 25 Sup. Ct. Rep., 342; Sioux City Bridge Co. vs. Dakota County, decided this

day (— U. S., —, post, —, 43 Sup. Ct. Rep., —). Plaintiffs have clearly failed to establish that there was intentional and systematic undervaluation by the county boards. Strong evidence to the contrary is furnished by the fact that in thirty-three counties, including those in which the largest cities are located, no reduction was made in the valuation of real estate, and that in the remaining sixty-seven counties the reduction varied from 1 to 50 per cent. Plaintiffs have failed, likewise, in showing systematic refusal on the part of the State board to allow a proper reduction in the valuation of any railroad. The further contention that, by reduction of the Norfolk & Southern's assessment, the other plaintiffs were discriminated against, is also unfounded.

"The claims that the assessments made by the Legislature in 1920 violate the due process and commerce clauses of the Federal Constitution and the true value and uniformity clauses of the State Constitution rest largely upon the contentions that the valuations were made on wrong principles and are excessive. There was ample opportunity to be heard; and the opportunity was availed of. There is no suggestion of bad faith. At the most there have been errors of judgment; and mere errors of judgment are not subject to review in these proceedings. Pittsburg, C. C. & St. Louis R. Co. vs. Backus, 154 U. S., 421, 38 L. Ed., 1031, 14 Sup. Ct. Rep., 1114; New York ex rel. Brooklyn City R. Co. vs. New York, 199 U. S., 48, 52, 50 L. Ed., 79, 85, 25 Sup. Ct. Rep., 713. There was no taxation of interstate commerce. Postal Teleg. Cable Co. vs. Adams, 155 U. S., 688, 39 L. Ed., 311, 5 Inters. Com. Rep., 1, 15 Sup. Ct. Rep., 268, 360; Western U. Teleg. Co. vs. Taggart, 163 U. S., 1, 41 L. Ed., 49, 16 Sup. Ct. Rep., 1054. * * *"

In the case here under consideration there is no contention on the part of the appellant that there was any intentional violations of the essential principles of practical uniformity in arriving at the value of the intangibles of the Railway Company, it being the contention of appellants that an essentially wrong formula was used and that it obtained a result which discriminated against the appellants, and while it is not admitted, but expressly denied, that there is any proof to show that any actual

discrimination resulted against appellant by the action of the Tax Board in finding their intangible values, there is certainly no evidence that the Board was actuated by any wrong motives or that there was any systematic intentional unequal assessments against them. The Supreme Court found that the Board was not guilty of any fraud in arriving at this value. (Record, p. 544.)

In the case of Sioux City Bridge Co. vs. Dakota Co., 67 L. Ed., 231, Chief Justice Taft in delivering the opinion of the court said, quoting from the case of Sunday Lake Iron Co. vs. Wakefield Twp., 247 U. S., 350:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional, systematic undervaluation by State officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. Raymond vs. Chicago Union Traction Co., 207 U. S., 20, 35, 37, 52 L. Ed., 78, 87, 88, 28 Sup. Ct. Rep., 7, 12 Ann. Cas., 757." Analogous cases are Greene vs. Louisville & Interurban R. Co., 244 U. S., 499, 516-518, 61 L. Ed., 1280, 1289, 1290, 37 Sup. Ct. Rep., 673, Ann. Cas., 1917E, 88; Cummings vs. Merchants Nat. Bank, 101 U. S., 153, 160, 25 L. Ed., 903, 905; Taylor vs. Louisville & N. R. Co., 31 C. C. A., 537, 60 U. S. App., 166, 88 Fed., 350, 364, 365, 372, 374; Louisville & N. R. Co. vs. Bosworth, 209 Fed., 380, 452; Washington Water Power Co. vs. Kootenai County, 270 Fed., 369, 374.
>
> "The charge made by the bridge company in this case was that the State, through its duly constituted agents, towit, the county assessor and the county board of equalization, improperly executed the Constitution and taxing laws of the State, and intentionally and arbitrarily assessed the bridge company's property at 100 per cent of its true value, and all the other real estate and its improvements in the county at 55 per cent.

"It is therefore just that, upon reversal, we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well established rule in the decisions of this court, cited above, that mere errors of judgment do not support a claim of discrimination, but that there must be something more,—something which, in effect, amounts to an intentional violation of the essential principle of practical uniformity. Sunday Lake Iron Co. vs. Wakefield Twp., 247 P. S., 350, 353, 62 L. Ed., 1154, 1156, 38 Sup. Ct. Rep., 495."

AS TO THE VALUE OF THE STOCK SEPARATELY CONSIDERED.

The stock of the corporation was not for sale. It had never been on the market. It had no market value. The Board had a right to consider and find its real value. That it *might* have a value in excess of market value, or par value, or "value as a profit paying property," was held by the Supreme Court in the Shannon case. That it *did* have a value in excess of its par value and in excess of its "value as a profit paying property" is conclusively and clearly shown by the evidence. The evidence as to the value of the "entire property" has been set out and discussed above. That the stock was worth the difference between the indebtedness and the entire value of the property is a proposition which cannot be doubted. That it has such a value, and a value approximating that ascribed to it by the Board, was testified to by the financial experts placed upon the witness stand by petitioners in an effort to prove it to be worthless. (See testimony of W. D. Sherwood, Record, p. 207.)

But if the valuation of the stock, separately considered, were excessive, this, we think, would be immaterial so long as the final results of the valuation are correct, or rather, so long as there was substantial evidence to warrant the Board's findings as to "tangible" values and as to the value of the entire property. For the valuation of the stock separately, under the statute, is simply a means to an end. It might be undervalued or overvalued, and the *result* might be correct. The evidence showing, as it undoubtedly does, that the Board was warranted in taking $28,-

372,810 as the value of the tangible properties and $39,116,033 as the value of the "entire properties," the resulting valuation derived by subtracting the "tangible" valuation from the valuation of the "entire properties," the Board's action stands unimpeached, even though it were conceded that there was error in the calculation of the value of the stock separately. Suppose the Board had said that the stock is worth $100 and the bonds are worth $39,115,833, and, therefore, that the "entire properties" were worth $39,116,033; if the "entire properties" were in fact worth $39,116,033, what difference would it have made to petitioners? The result to petitioners would have been exactly the same if the Board had said that the stock is worth $30,000,000 and the bonds are worth $9,116,033, and, therefore, the "entire properties" are worth $39,116,033, if in fact the "entire properties" were worth that sum. The fact is undisputed that the Tax Board, after considering all of the evidence, thought that the "entire properties" were reasonably worth $39,116,033 without regard to the value of the stock separately considered. This very clearly appears in the testimony of Mr. Bagby, the only witness upon the subject and the only witness who was in a position to know what the Board considered and how its judgment was formed.

As to the Formulae.

Much has been said about the "formulae." Petitioners' whole case is largely based upon supposed mathematical errors in the *processes* of the formulae. Not much attention has been paid to the question of whether or not correct results were reached by the Board. It seems to have been assumed that the formulae controlled the judgment of the Board and that it necessarily led to the wrong results. Neither assumption, we think, is well founded.

Mr. Bagby says that the formulae were private memoranda gotten up by him in an effort to give the carriers a mathematical process by which the results could be figured out. Whether the other members of the Board even considered the formulae or not is not even shown, nor, apparently, did the petitioners deem this at all material. The other members of the Board were tendered

to petitioners for use, as witnesses, but they were not put on the stand. That the formulae neither controlled the judgment of the Board nor led to incorrect results is, we submit, conclusively shown by the Record.

The only connection of the formulae with the valuation is that they were given out in connection with the "preliminary valuation." After that, and when the matter came on for final hearing, the Board heard and considered all evidence and argument offered and in the light of the evidence and argument considered the question as to the correctness of the valuation of "tangibles" and the valuation of the "entire properties." That the formulae controlled the judgment of the board at the final hearing is negatived by every piece of evidence in the record pertaining to the matter. Mr. Bagby testified that the Board considered all evidence of the tangibles and the valuation of the entire properties represented its "best judgment upon all the information" before it. He also said that "disregarding the mathematical calculation" the "valuation represented the best judgment of which he was capable under all the information he had." (Record, p. 358.) He expressly said that *after the promulgation of the formulae* the Board "took into consideration the evidence that was offered by the Railway Company at its final hearing." (Record, p. 358.) He also said: "That each of the railroads filed their reports in forms similar to those of the I. & G. N. and T. & P. and had done so for five or six years back. That the Board considered these reports and the information in them * * * and that he considered the I. & G. N. reports and former valuations made by the Board of all railroads, and got information from any source where he could find it, and considered all the evidence and argument offered by counsel for the railroads, and their witnesses, and that *the final valuation in each instance reflects the witness' honest judgment as to what the evidence showed the values* to be. * * * That after hearing the evidence and those statements, the Board decided, in their best judgment, that some of them should be reduced, and that the witness concurred in such decisions, because of the effect of the evidence on his mind. That he understood

the law required him to consider the evidence, that he did so to the best of his knowledge and ability. That the Board applied the formula, and if it resulted in what they thought, in their best judgment, was correct, they let it stand; that if the Board decided, after the evidence was in, that the formula did not reflect what one would call the best judgment of the Board, then the Board changed it." (Record, pp. 358-361.) This testimony, which is not at all contradicted by anything this or any other witness said, shows, we say, that the Board, in the final valuation, considered all evidence and information in its possession upon the question as to the correctness of the results reached by it. If the results reached by the formula reflected what, in the judgment of the Board, were the correct results, they were allowed to become final; if the evidence showed that the *results* reached by the formula were incorrect, then the results were changed accordingly. What more could have been done? It was the *evidence*, and not the formulae, that determined the final results. What difference would it have made if originally the Board had multiplied four dogs by five cats and reached a certain *result* in dollars, provided that the result thus originally reached through incorrect mathematics was, on the final hearing, shown by the evidence to be substantially correct? The *results* independently considered, in the judgment of the Board, based upon a consideration of all evidence, were correct; would it have been of any benefit to the petitioners for the Board to have entered a formal order saying that the formula was incorrect and that it was repudiated, but that the resulting valuations were correct and would be adhered to? If there is substantial evidence to indicate that the valuation finally made by the Board is approximately correct, it seems like quibbling to say that the erroneous processes of the formulae produced substantial injury. We submit that the evidence set out and discussed above clearly warrants the findings of value made, and that any error in the mathematical processes were harmless and such as to leave the action of the Board unimpeached.

GENERALLY, THE BURDEN OF PROOF.

We have heretofore discussed the matters involved as if the burden rested upon the respondents to show sufficient evidence to support the judgment of the Tax Board. Even if the burden of proof were so placed we are confident that the undisputed facts set out above would be sufficient. But, clearly, the burden is upon the petitioners to show by satisfactory proof that the facts did not exist to support the valuation. The Tax Board was acting on a matter within its undoubted jurisdiction and confided to its discretion. Its order is at least prima facie valid. The petitioners level an attack upon it because of matters not appearing in the face of the final order, and it would seem superfluous to cite authorities to the proposition that the burden is upon them to negative by affirmative and competent proof every lawful hypothesis upon which the Board may have proceeded. Nevertheless, we desire to cite and briefly discuss some authorities which we regard as being closely in point.

Fraud with bad intent is not seriously charged, if charged at all. Even if charged, no reasonable man can contend that there is any evidence to support the allegation. The District Court of the United States has passed upon the exact state of facts presented here, and repudiated any suggestion of fraud; the trial court expressly found that there was nothing upon which to base such a charge; the Court of Civil Appeals negatives its existence. All that is left is a charge of excessiveness of valuation, which, according to petitioners, amounts to legal fraud or a showing of arbitrariness. We have set forth evidence which in our judgment affirmatively disproves either excessiveness or an arbitrary spirit. But if this had not been shown, petitioners still would have made no case.

A very similar attack, upon a very similar state of facts, was made upon a valuation in Ry. Co. vs. Backus, 154 U. S., 421. In that case the railway company reported its property values as being about $8,000,000; it had been assessed for the previous year at $8,538,053; the Tax Board increased this assessment to the sum of $22,666,470, an increase of about 150 per cent; the

values of other railways were increased by only 43 per cent; upon the hearing before the Board the Railway Company proved up its net and gross earnings, and the per cent of return on the property on a valuation of about $8,000,000; the members of the Tax Board did not inspect the property nor did they examine any persons acquainted with the value thereof. The Tax Board only called one witness upon the trial, one of its members, and he simply testified that no property located outside of the State was included in the valuation. Thereupon the Supreme Court said:

"Upon this testimony the decision of the court was that there was nothing to impeach the assessment made by the State Board, and in this conclusion we concur. The true cash value of the plaintiff's property in the State of Indiana in the year 1891 was a question of fact, the determination of which for the purposes of taxation was given to this special tribunal, the State Board. *Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.* Here the question determined by the State Board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board. *It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determination.* It is not, however, contended by counsel that there was any actual fraud on the part of that board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact bore, and did so with the purpose of making the plaintiff bear a larger share of the burden of the support of the State government than it rightfully should. The contention is rather that the board made a grievous mistake in placing so high a value, and that it took into consideration property outside of the State, and gave to the property with-

in a value partly deduced from that without the State. The testimony, however, does not sustain this contention." Ry. Co. vs. Backus, 154 U. S., 434-435.

In Maish vs. Arizona, 164 U. S., 599, 610, the Supreme Court said that in a case like this, *"something more than an error of judgment must be shown, something indicating fraud or misconduct."* And because of the analogy of questions there and here presented we quote the following from the opinion:

"There is nothing to show that the board, in fixing the value of cattle at $7.42, acted fraudulently or with any wrongful intent, or that that valuation was not the result of its deliberate judgment upon sufficient consideration and abundant evidence, and it would be strange, indeed, if an assessment could be set aside because a single witness is found whose testimony is that the valuation was excessive. No assessment could be sustained if it depended upon the fact that all parties thought the valuation placed by the assessing board was correct. Something more than an error of judgment must be shown, *something indicating fraud or misconduct.* Neither is the fact that an officer of the railroad company came before the board and declared its willingness to pay taxes on a certain valuation and its intention to resist the payment of taxes on any higher valuation sufficient to impute fraudulent conduct to the board, although it finally fixed the valuation at the sum named by the railroad company. It appears from the testimony of one of the members of the equalization board that it was guided largely by the valuation placed in other States and Territories upon railroad property, and that from such valuation, as well as from that given by the railroad company, it made the assessment at something like the average of the valuation of railroads in the various States and Territories named. It is unnecessary to determine whether this board erred in its judgment as to the value of this property, whether it would not have been better to have made further examination and taken testimony as to the cost of construction, present condition, etc. *Matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its* judgment cannot be overthrown. Pittsburg, Cincinnati, Etc.,

Ry. Co. vs. Backus, 154 U. S., 421-435." Maish vs. Arizona, 164 U. S., 610-611.

Metropolitan Street Railway Co., vs. New York, 199 U. S., 1. This case has to do with exemption from taxation, but in discussing the presumption that all property is subject to tax and the rule that the burden is on him who asserts that property is not subject to the tax to prove it by satisfactory evidence, the court said:

> "It must be borne in mind that presumptively all property within the territorial limits of a State is subject to its taxing power. Whoever insists that any particular property is not so subject has the burden of proof and must make it entirely clear that, by contract or otherwise, the property is beyond its reach."

As showing that franchises and other intangibles are valuable property subject to taxation, the court said:

> "Indeed, growing out of the conditions of modern business, a large proportion of valuable property is to be found in intangible things like franchises. We had occasion to review this subject in Adams Express Company vs. Ohio, 166 U. S., 185, where we said (pp. 218, 219):
>
> "'In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from taxing at its real value such intangible property. * * * It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."

Nolan vs. San Antonio Ranch Company, 81 Texas, 315.

In discussing the burden of proof in the case attacking an assessment of property for taxation, Chief Justice Stayton said:

"In the absence of evidence to the contrary the presumption is that the assessment was properly made, and in this case if the assessment was open to inquiry the burden of proving its incorrectness was on the plaintiff, and in the absence of such proof judgment should have been rendered for defendant."

Respondents submit that the petitioners have failed to show:

1. That any discrimination was practiced against them by the Board in the administration of the Intangible Assets Tax Law.

2. That any discrimination resulted from the undervaluation of other property in Harris County by the county authorities.

3. That any injury was done respondents by reason of the fact that their intangible property was assessed in Harris County, Texas, at less than its value and their intangibles assessed at a higher proportional per cent than the other property when the average assessment of the tangible and intangible properties of respondents was as low or lower proportionally than other property in Harris County.

4. That if any discrimination existed, the same was systematic or intentional.

5. That the action of the Board in valuing the intangibles of the Railway Company was fraudulent and arbitrary or that they failed to act in good faith.

6. That the valuations found by the Board of the intangibles of the Railway Company did not reflect the best and honest judgment of the Board, and, therefore,

Respondents pray that the judgment of the Supreme Court of the State of Texas be affirmed and that respondents be granted such other relief as may be due them.

Respectfully submitted,

W. A. KEELING,
Attorney General.

FRANK M. KEMP,
Assistant Attorney General.
Attorneys for Respondents.

INDEX.

Pages

1. *Concise Abstract Presenting Succinctly the Questions Involved and the Manner in Which They were Raised* 1-19

Petition for Writ of Ceriorari pending 1

The validity of a statute of Texas brought in question, as contrary to the Constitution of the U. S. 2.3

New parties on account of death and elections, on this writ of error, as additional parties 3

Case for perpetual injunction to restrain the collection of taxes an alleged intangibles brought by the Receiver et al., who lost in the trial court; prevailed in the Court of Civil Appeals, the intermediate court, which court held the statute unconstitutional as construed by the State Tax Board, but reversed and rendered in conformity with the trial court by the ultimate court—the Supreme Court of Texas 2-3

State Tax Board found the road had $10,743,233 intangibles 4

Position of Petition for Certiorari, separately presented in separate brief here stated for discrimination 5-6

Position on this brief and writ of error one point at bottom stated, to wit: That the Tax Board had valued intangibles under the form of tangibles, already equalized by the intangible board, and had secretly tried to set aside the equalization and to bring about a double taxation, claiming that the statute so authorized them to do; the Court of Civil Appeals finding that the statute did not so authorize, and that if it did, it was unconstitutional, and the Supreme Court of Texas sustaining the Tax Board that such a valuation of tangibles under the guise of

intangibles conformed to the statute, and maintaining the validity of the statute in conflict with section 1 of the 14th amendment to the Constitution of the U. S., and the due process of law and equality before the law therein provided; there being now presented the view of the Court of Civil Appeals of Texas—the intermediate court—that if this be the right construction of the statute it is contrary to the 1st section of the 14th amendment, and that the statute would then be invalid; and the view of the Supreme Court of Texas that the statute as construed and enforced by it is valid, notwithstanding the 1st section of the 14th amendment to the Constitution of the U. S. ..... 2—bottom page 6—page 11

The manner in which this question was raised and the showing that it was raised on original trial and carried through all of the courts and through the Supreme Court of Texas in the pleading and in assignments of error; in the action of the Court of Civil Appeals; and in the overruling of this position by Supreme Court of Texas, and again presented in a motion for a new hearing in that court; overruled and presented in assignments of error with the petition for writ of error allowed 11.18

2. *Specifications of Error Relied upon on Writ of Error* 19-25

Specification that the Supreme Court of Texas erred in construing the statute herein involved as not in conflict with section 1 of the 14th amendment to the Constitution of the U. S., though brought in question as so in conflict, because it held that under said statute the State Tax Board was authorized to revalue tangibles in various counties penetrated by the road under the guise of intangibles, and redistribute them on a mile-

age prorata to the various counties penetrated by the railroad, although the local boards had already equalized them, and that thereby these tangibles could be valued and taxed twice, first in the counties where they were, and second, to an extent, in counties where they were not on different levies and proportions of taxes, contrary to the Constitution of the State and contrary to the due process of law and equity before the law provided by the 1st section of the 14th amendment to the Constitution of the U. S. —specification 1 19-20

Error in overruling the Court of Civil Appeals and its holding that the Tax Board had no right to revalue tangibles and redistribute them to various counties under the guise of intangibles, and had no power to secretly set aside the valuations thereof made by the county boards, and that the statute did not mean this; but that if it did, it was contrary to the 1st section of the 14th amendment to the Constitution of the U. S., Specification 2 21-22

Error of the Supreme Court in construing the tangible tax statute in conflict with the construction of the Court of Civil Appeals, and in upholding the State Tax Board on such construction and confirming the vality of this statute as thus construed, in conflict with the 1st section of the 14th amendment to the Constitution of the U. S.; Specification 3 22-23

Error of the Supreme Court in passing over without mention the finding of law of the Court of Civil Appeals construing such statute in conflict with the 1st section of the 14th amendment to the Constitution of the U. S.; the Court of Civil Appeals having final power to find the facts, and there being no conflict in the evidence; and the

Court of Civil Appeals having found that the State Tax Board had no right to make a secret and second assessment of the tangibles and distribute them in the counties where they did not exist; Specification 4 ... 23-24

Error of the Supreme Court in adopting the construction of the State Tax Board of the intangible tax statute, in conflict with the construction of the Court of Civil Appeals of Texas, which held in such construction the statute would be in conflict with the 1st section of the 14th amendment to the Constitution of the U. S., as pointed out above, and error of the Supreme Court of Texas in the statute so construed by it, and holding that it was not in conflict with the 1st section of the 14th amendment and the equality and due process of law thereby granted; Specification 5 ... 24-25

NOTE: There is at bottom but one point, as appears above, the specifications simply present this one point from slightly different angles.

3. *Brief of the Argument* ... 25-59

Brief and petition for writ of certiorari referred to as covering the points involved under that petition, this court having entered an order to take the submission of that petition with this submission ... 25-26

Positions stated of the invalidity of the statute as construed and applied by the Supreme Court of Texas, in conflict with the 1st section of the 14th amendment to the Constitution of the U. S. ... 26-27

Statutory history of the State Tax Board and statutes set out herein involved ... 27-31

Applicable portions of the State Constitution set out ... 31-32

Provision of the State Constitution for due

process of law, and that taxation shall be equal and uniform, and that all tangible property of railroads shall be assessed and the taxes collected in the counties where the property is situated, except rolling stock....31-32

Constitutional provision for equalizing tangible values by county boards.... 32

Statutory method of rendition of property.... 33

Taxpayers in Texas do not swear to values, but suggest them 32

Courts judicially know property is under-valued 32-33

Position of defendants that they did not have to deduct true value of tangibles to get at intangibles, and that the word intangibles in the statute was an "arbitrary" and equalizer 33-34

Supreme Court of Texas holds that intangibles an exception on the constitutional requirement and need not be valued by the county boards, but all tangibles must be so valued, except rolling stock 34

Constitution provides boards of equalization established by statute in each county, whose action is final 35-36

Method pursued unconstitutional 38-40

Plead in this case and admitted that true values of tangibles not deducted and that board secretly valued tangibles under the guise of intangibles, and board so plead and admitted, through Commissioner Bagby.... 41-48

Formulas used by board explained by Court of Civil Appeals 48-49

Supreme Court overruled our objection that this construction would make the statute unconstitutional, and held that it was constitutional, and exposition of this error.... 49-55

Valuations of tangibles by county boards could not be set aside as was done secretly by State Board 57

The point absolutely involved in the decision, as well as directly decided without decision, and therefore must be ruled 57-58

CASES CITED HEREIN.

	Page
Baumon v. Jaffrey, 86 Tex. 618	40
Board v. C. B. & Q. R. R. Co., 44 Ill. 238-9	33
Cissna v. Tennessee, 246 U. S. 289	58
Cummings v. Bank, 101 U. S. 157	33, 37, 51
Dankhe-Walker Milling Co. v. Bondurant, 257 U. S. 282	26, 58
Farncomb v. Denver, 252 U. S. 7	57
German Nat. Bank v. Kimball, 13 Otto 732	38
Guesti v. Galveston Tribune, 105 Tex. 508	40
Johnson v. Holland, 17 Texas C. A. 210, and 43 U. S. 71	36
Lively v. Railway, 102 Texas 546	36
Merchants National Bank v. Richmond, 256 U. S. 635	58
M. K. & T. R'y v. Shannon, 100 Texas, 379	34, 49, 50, 51, 54, 58
Pollock v. R'y, 772	40
Railroad and Telephone Cos. v. Board, 85 Federal, 309	33, 37
Trustees v. Guenther, 19 Federal, 399	33
Tweed v. Tel. Co., 107 Tex. 253	40

IN THE

SUPREME COURT

OF THE UNITED STATES

JAMES A. BAKER, RECEIVER OF THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, ET AL,
vs. *Plaintiffs in Error,*
KARL L. DRUESEDOW, TAX COLLECTOR OF HARRIS COUNTY, TEXAS, ET AL,
Defendants in Error.

No. 488 OCTOBER TERM 1921 AND (28,443)

BRIEF FOR PLAINTIFFS IN ERROR

1.

Concise Abstract Presenting Succinctly the Questions Involved and the Manner in Which They Were Raised.

On this same record a writ of certiorari, involving a portion of the questions raised, has been petitioned for, and this court has deferred action thereon until submission of the case on writ of error. This brief covers the points coming under the writ of error, to wit:

Wherein is drawn in question the validity of a statute of Texas, on the ground that it is repugnant to

the Constitution of the United States, the decision being in favor of the validity.

The suit was filed in the District Court by Messrs. Baker and Lyons as Receivers, and R'y, against Druesedow, Tax Collector of Harris Co., Texas, and the four members of County Commissioners' Court of that county, as having some authority over the collection of taxes, and was for a perpetual injunction to restrain the collection, claimed by the State and county, in amount of $6,605.34, as payable to the Tax Collector of that county; claimed as taxes on $603,227.00 apportioned to Harris County on a mileage basis, as its apportionable part of $10,743,223.00, amount of intangibles found by the State Tax Board of Texas to be owned by the International & Great Northern Railway Company and taxable in 1915. The defendants answered, and the Tax Collector brought a cross-action and had judgment for $6,605.34. (Tr., sections 7, 59-62, Opinion of Court of Civil Appeals, 400. References are to pages of the Transcript, unless otherwise stated.)

The plaintiffs appealed to the Court of Civil Appeals, First District, and there prevailed, the court reversing and rendering the case in their favor, awarding them a perpetual injunction and holding that no intangibles existed, that the State Tax Board had misinterpreted the statute as authorizing them to revalue tangibles under the form of intangibles, and that tangibles could not be so constitutionally subjected to a second taxation. (Tr. 411 and 412.)

The defendants applied to the Supreme Court of Texas, which is the ultimate State court, and obtained a writ of error, and that court referred the case to one of its Commissions and adopted its opinion, and reversed the

Court of Civil Appeals and affirmed the judgment of the trial court (Tr. 541 and 548), and confirmed the construction of the statute of the State Tax Board and trial court, which was that the Board had a right to value tangibles under the form of intangibles; that the word "intangibles" was an "arbitrary," and that the Board could review the valuations of tangibles made by the thirty-seven counties, and add to their valuations thereof. The Court of Civil Appeals had held that to do this would be unconstitutional, and that if the statute had this meaning it would violate the Constitutions, both the State and Federal. (Tr. 400, 411-12.)

Under the rules of practice of Texas courts, after an appeal is perfected, no notice is taken, pending revision by the higher courts, of changes of parties by death, or other circumstances, nor is any substitution of parties made. After the appeal from the trial court, Co-Receiver Lyon died, and Baker was appointed sole Receiver (Tr. 579); and Dillingham, a surety on the cost bond on that appeal, died testate, and Frances Maria and E. K. Dillingham are the executrix and executor of his will, confirmed by the Probate Court (Tr. 587); they are, therefore, plaintiffs in error here, along with Receiver Baker and the railway. After the completion of the appeal, Druesedow, Tax Collector of Harris County; Ward, County Judge; Lloyd, Smith, Keiser and Barker, constituting the Commissioners' Court, went out of office; except Commissioner Barker, who was re-elected; and Miller became Tax Collector; Bryan County Judge; Spencer, Martin and Sharman, County Commissioners; who are, therefore, added as defendants in error. (Tr. 582-6.)

Counsel for the defendant in error at the time the writ

of error was sued, were C. M. Cureton, Esq., Attorney General of Texas, and Tom Beauchamp, Esq., Assistant Attorney General of Texas. Mr. Cureton has since become Chief Justice of the Supreme Court of Texas, and W. M. Keeling, Esq., of Austin, Texas, is now Attorney General, and takes his place in this case. Mr. Beauchamp has also resigned, and Frank M. Kemp, Esq., Assistant Attorney General, takes his place in this case. Their postoffice address is Austin, Texas. The other counsel are Messrs. Fisher & Campbell, and Ammerman, Campbelel & Nicholson, whose postoffice address is Houston, Texas. (Tr. 609.)

We now trace the history of the case, and of the Federal questions herein dealt with:

For the year 1915, the State Tax Board found that the railway owned intangibles of the value of $10,743,-233.00, and declared this their value, of which—on a mileage basis—$603,227.00 was apportioned to Harris County, as stated above; and under the rate of taxation in Harris County $6,605.34 was claimed for the State and county against this amount, and judgment given therefor, plus interest for the total amount of $6,670.10, with interest thereon from March 28, 1916, at 6 per cent., and costs. (Tr. 595.)

The road has 1106 miles of main track, and it will, therefore, be seen that on the basis of the rate in Harris County there would be involved, for all counties, over $100,000 principal claimed.

The Court of Civil Appeals and the Supreme Court are in complete collision; the first holding that the intangible tax act would be unconstitutional, as acted on and construed by the Board, the Supreme Court holding it constitutional as so construed and acted on. By Chap-

ter IV, Title 126, of the Revised Statutes of Texas (the immediately relevant sections of which are hereinafter set out in the argument), a State Tax Board was constituted to consist of the State Tax Commissioner, the Comptroller and the Secretary of State, and directed to find the intangibles of incorporated railroads, ferry companies, and turnpike or toll companies, and of every person doing business of the same character. (R. S. 7414.) The railroads were required to make preliminary annual statements (R. S. 7416-18), and the Board to hold hearings and make a preliminary estimate of the intangibles to be submitted at the hearings, after which they were to make a final estimate, and to apportion the same for taxation to the respective counties on a mileage prorate. (R. S. 7420-7422.) The allegations are set out by excerpts from the pleading and statements thereof by the Court of Civil Appeals in its opinion. (Tr. 400-406.) The Board was required by the statute to make a just, fair, equitable valuation of the intangibles—having first valued the whole property and deducted the physicals—the residue to be the intangibles. (R. S. of Texas 7420.)

The plaintiffs' positions are: (1) On Certiorari; (2) on this writ.

1. Presented on petition for certiorari:

(*a*) That the Board had not made a just, fair, equitable and careful valuation, but had acted against all evidence on a deliberated plan and supposed existence of intangibles, in order to impose on the railway large taxes.

(*b*) That there were no intangibles; but if any, not in the huge amounts found.

(*c*) That the Board had concealed its processes and

refused to state its bases, when demanded, except that on certain formulas they claimed to have valued the stock of the foreclosed and insolvent railway par $4,822,000.00, at $12,934,533.00. But had valued tangibles as intangibles.

(*d*) That at the hearing plaintiffs had shown, without contradiction, that there were no intangibles, and that the Board had introduced no evidence, except certain formulas, which necessarily lead to a wrong result and produce unequal results as between different railroads; and that the Board had acted fraudulently and with deliberate intent to find values which did not exist; and acted on theories, if any they had, which no reasonable mind could follow.

(*e*) That the Supreme Court of Texas had usurped, without jurisdiction, to render this case.

These points, as far as they present Federal questions, are covered under our petition for writ of certiorari, and discussed in our brief in support, on the ground that rights and immunities were claimed by the petitioners under the Constitution of the United States, and the First Section of the Fourteenth Amendment as there set out; and that the decision of the Supreme Court of Texas was against such rights and immunities, specially set up and claimed. They are put to one side in this brief, as belonging under certiorari; but it is respectfully submitted that for the comprehension of this brief and the points on which this writ of error stands, it is essential to consider the petition for the writ of certiorari and the accompanying brief, and that they go herewith.

2. The points made below on which the writ of error stands is, at bottom, one only, viz:

That the State Tax Board had valued intangibles un-

der the form of tangibles, when they had no authority to value tangibles, which could be and had been valued by the County Boards alone, whereby there had resulted inequalities and discrimination; and that they had done this upon a construction of the State statute covering the actions of the Board, which would make that statute unconstitutional and in conflict with Section One of the Fourteenth Amendment to the Constitution of the United States. Plaintiffs relied throughout on the First Section of the Fourteenth Amendment and similar provisions in the Constitution of Texas, guaranteeing equality of valuations for ad valorem taxation, and prohibiting a double valuation. (Tr. 1-23, Opinion of Court of Civil Appeals, 400-415.) The validity of the statute so construed by the Supreme Court of Texas, and sustained, is now attacked.

The defendants asserted, in their pleadings, that the Tax Board had the power to value tangibles under the form of intangibles in order to thus "complement" the action of the thirty-seven different valuing and assessing bodies of tangibles in the thirty-seven counties penetrated by the road.

The position of the State and County authorities and of the Supreme Court is:

That the word "intangibles" in the State Tax Board statute was an "arbitrary," as they call it, and that the tax statute, when rightly construed, did not merely give this Board the power to value intangibles for taxation, but also to equalize and value tangibles of the railroads; wherein, in the opinion of the Board, the various county authorities had undervalued tangibles, and so gather up into the "arbitrary" of intangibles such undervaluations of tangibles in different counties, and that this was the

meaning of the statute; and that, therefore, the State Tax Board had the power exercised, to include in the word "intangibles" tangibles, in the different counties, and having so included these tangibles, to distribute these tangibles on a mileage apportionment to the different counties; and it was not only plead but admitted in evidence by the Tax Commissioner that this was done.

The position of the plaintiffs in error was that if this was the meaning of the statute, then it is in conflict not only with the State Constitution, but with the first section of the Fourteenth Amendment to the Constitution of the United States; because the State Constitution and statutes require equality of valuation for taxation on the ad valorem basis, and as found by the Court of Civil Appeals (Tr., 411-12); and that the Constitution of Texas required physicals of railroads to be valued locally by the County Assessor of each county, and equalized by the Commissioners' Court of each county; and that this having been done, and put on the rolls, it was to be presumed that the valuation accomplished equality with other tax payers on physicals in each county; that the statute as construed by the State and county authorities was unconstitutional and brought about a double and unequal taxation of physicals in each county, and their distribution the mileage basis, where they did not exist, contrary to the Constitution of the State, for taxation on physicals in counties outside of the counties in which they existed; and that, therefore, it would result that physicals would be taxed first in the counties where they existed on an equality with other physicals, after being equalized with them; and then would be valued again under the guise of intangibles and distributed principally into counties where they did not ex-

ist; and that it was now conceded that all of this had been done secretly, and only developed after the litigation commenced (Constitution of Texas, Section 2, Art. VIII); all in violation of the First Section of the Fourteenth Amendment to the Constitution of the United States, and of the equality and due process therein provided for, and as claimed throughout the litigation, as shown below.

The Supreme Court of Texas and the State Tax Board have adopted the view that such double taxation and the revaluing of tangibles under the form of intangibles do not make the State statute unconstitutional. The Court of Civil Appeals took absolutely the contrary view, and held that this was the wrong construction of the statute, and that this wrong construction was the basis of the error of the State Tax Board, and that if this construction were adopted, the statute would be unconstitutional and in conflict with the Constitution of the State and of the United States. (Tr. 411-12.)

Therefore, there is now presented the opposing views of the Supreme Court of Texas and the Court of Civil Appeals of Texas; the Supreme Court adopting the construction of the State Tax Board, and holding that the statute as so construed is not unconstitutional; and the Court of Civil Appeals repudiating the construction of the State Tax Board and holding that if this construction were correct the statute would be unconstitutional.

The Court of Civil Appeals found that this being the basis of the Board—that is, valuing tangibles under the form of intangibles—and that the evidence showed no other basis, the case should be reversed and rendered for plaintiffs below, who are plaintiffs in error here.

out the history of the action of the State Tax Board, and evidence introduced before it, and took the position: First: That there were no intangibles. Second: That if there were intangibles, not in the amount claimed; and Third: That if any intangibles existed they should be equalized down to the low valuations in Harris County of tangibles, and not carried at 100 per cent.; and took the position that the State Tax Board had acted in violation of the First Section of the Fourteenth Amendment. (Tr. 26.)

The defendants took the position that the State Tax Board had acted on just bases, and that the intangibles did exist; and furthermore, that the intangible tax statute constituting the State Tax Board was an equalizer, and authorized the State Tax Board to deduct from the total valuation the valuation of physicals made by the local boards, and the residue would be intangibles (Tr. 34-35); that is, that after equalizing down to a parity with other under-assessed physicals in different counties, the aggregate of such equalizations of the railroad should be deducted from the total value, so as to take away the advantage of such equalizations from the railroad, and passing back into, as they termed in the evidence, an "arbitrary" term of "intangibles," benefits of equalization of tangibles, and put them back for distribution to the various counties on a mileage basis under the "arbitrary" of intangibles; and that the equalization of tangibles by the local boards in thirty-seven counties could be reviewed secretly by the State Board, without notice, and corrected, and wherein the State Board thought that the County Boards had valued tangibles at too low a figure, be adjusted under the "arbitrary term" of "intangibles" upwards, although the State

Constitution and laws gave the local boards final authority. This is involved and obscured in the immediate pleadings, but made absolutely plain in the evidence, and admitted in writing by the defendants and in the evidence to have been done, as pointed out below. The plaintiffs demurred and all demurrers were overruled. (Tr. 50-2; 59.)

On trial, the defendants took the position that an abortive suit in the Federal Court, which had been dismissed by the Federal Judge, on application for temporary injunction, was *res adjudicata* against the plaintiffs. The plaintiffs that it could not be *res adjudicata:* that is, that the denial of a temporary injunction and dismissal of a case was not *res adjudicata;* and besides that the case was dismissed without prejudice. This was supported by the Court of Civil Appeals (Tr. 414-16), and by the Supreme Court of Texas, by implication, as it otherwise considered the case. To support *res adjudicata* on trial in the District Court, the defendants introduced the pleadings in the Federal Court, wherein it was set out by them and plead that the State Tax Board had valued tangibles under the form of intangibles, and had a right to do so, and that this was the correct construction of the statute. (Tr. 347-350.) Mr. Bagby, State Tax Commissioner and member of the State Tax Board, testified at length, and on cross admitted that this had been done. (Tr. 366-7.) The Court of Civil Appeals found that the State Tax Board had acted arbitrarily, against all evidence, and without any basis whatever in finding that there were intangibles, and that "this arbitrary action of the Board was doubtless due to the misconception of the scope of the statute. The pleadings of the defendants *and the testi-*

mony of the Tax Commissioner construed the statute as authorizing it, when it deems the rendition of the physical properties of a railroad for taxation has been made at a less valuation than its fair and just value, to add to this value by an arbitrary fixing of intangible values of such railroad. It is clear that the statute has no such meaning and cannot be construed as conferring any such power upon such Tax Board. *It has no power to pass upon, correct, or in any way change the valuation of tangible property as fixed in the rendition and assessment of such property* for taxation. Its right to fix the value of tangible property is only for the purpose stated in the statute, of deducting the true value of such property from the aggregate value of the stock and mortgage indebtedness, and thus determine the value of the intangible property of the railroad. *Any statute which conferred upon the State Tax Board* the power to value and assess tangibles as intangibles and apportion such values among the various counties of the State, as provided in this statute, would be clearly obnoxious to the provisions of the Constitution which requires tangible property to be assessed in the county in which it is situated." (Article 8, Sections 8-11, 14, State Constitution; 197 S. W., Section 5, page 1049, and Tr. 411-2.) And also contrary to the First Section of the Fourteenth Amendment of the Constitution of the United States, citing Cummings v. Bank, 11 Otto, 153. (Tr. 412.)

The Supreme Court of the State takes the opposite view, and holds that the State Tax Board has the power to include tangibles, already assessed and valued in the counties, under the guise of intangibles, and re-assess and re-value them, and that this is the meaning of the

statute. This being the construction of the highest court of the State must be taken as the correct meaning of the statute as always maintained by the State Tax Board.

We will now show from the beginning of the case through into this court how this point was raised and followed.

In their petition, the plaintiffs set out methods by which the State Tax Board, at the hearing, had claimed to have reached the intangible valuation of $10,743,223 (Tr. 1-19); that the Board had, through certain formulas having no relation to fact, claimed to have found these tangibles; that the Board had not acted in good faith, but that they had fraudulently reached these fictitious results, and the plaintiffs invoked the Constitution of Texas and the First Section of the Fourteenth Amendment to the Constitution of the United States, on the ground that its property would be illegally taken, and that the valuation had been made without due process of law, and in violation of the equal process of the law. (Tr. 19.) The defendants plead that the matter was *res adjudicata;* that there had been a previous litigation in the Federal Court, with adverse result to the plaintiff. (Tr. 27-9.) Then in a long special pleading numbered XI, 5-8, set up that the statute, under which the Tax Board had acted, had created a "system," under which the Board was authorized and directed to deduct from the total value of the property the local valuations in each county, and that the "remainder" was to be "classified as intangibles" (Tr. 35, near top of page; and that the State Tax Board had the right to aggregate the valuations made for the different counties by the railroad, and deduct this ag-

gregate, and that the balance would be the intangibles, and to be so classified. The plaintiffs demurred (Tr. 52-59). Their demurrers were overruled. (Tr. 61.)

On trial the defendants introduced in evidence, in support of the plea of *res adjudicata*, the pleadings in the previous litigation in the Federal Court which resulted in a dismissal without prejudice, the case not going there beyond a hearing for a temporary injunction, and the Court of Civil Appeals sustained the proposition that this was not *res adjudicata*. (Tr. 414.) The trial court impliedly refused to sustain it, by giving no force to this plea. The defendants, however, on trial introduced the pleadings of the previous case, wherein it was set out by the then defendants, the State Tax Board (in a somewhat different way, but in the same effect as an answer on this trial) that the Board had a right to value tangibles under the form of intangibles, although already valued and equalized and put on the tax rolls by the local Boards of the thirty-seven counties. (Tr. 347-350.)

The defendants in this immediate case, upon cross-examination of Mr. Bagby, State Tax Commissioner, and leading member of the Board, and through him, admitted that the Board had done this, and had valued tangibles under the form of intangibles as an "arbitrary" (Tr. 366-7), and, as found by the Court of Civil Appeals. (Tr. 411-412.) The trial court filed conclusions of law that the valuation made by the State Tax Board was supported. (Tr. 64.) The court was requested to find as a conclusion of law that tangibles must be assessed locally, and that it is contrary to the Constitution that they should be assessed under the term of intangibles and apportioned on a mileage basis for taxation outside of the counties in which they are situated,

and that when an assessing authority uses a wrong principle of assessing value, the assessment should be set aside, and that the Constitution required equality (Tr. 74, sections 8, 9 and 11); and that more particularly the intangible tax statute, as construed, is unconstitutional and void, and in conflict with Section 1 of Article 14 of the Amendments to the Constitution of the United States, in that it deprives the plaintiffs of property without due process of law, and denies them the equal protection of the law. (Tr. 73, section 4.) The court refused to make these findings.

In a motion for a new trial the plaintiffs set up that the court erred in overruling plaintiff's demurrers, as above (Tr. 78, sections 3-4.) That the court erred in finding that the plaintiffs had not shown inequity, and in upholding the assessment of the Board; it being proved that the Board considered intangibles to be an arbitrary term, and had included in the assessment of alleged intangibles—$10,743,223.00—tangibles (Tr. 84, section 22); and that it was completely shown to the Board that the railway had no intangibles, and if any—which was denied—then very small in extent. And that it appeared upon all the evidence of this case, and was indisputably shown, that the Board did not find intangibles as such, but did find an arbitrary for intangibles, and if any there were, then in gross excess; it being denied that there were any. And that the Board refused to award the plaintiffs the protection of the law, and violated the first section of the 14th Amendment of the Constitution of the United States, whereby, if the assessment stood, the plaintiffs would be deprived of the property without due process of law, and in violation of the equal protection of the law. (Tr. 92, section F.) And also that the court had

erred in treating the intangible tax statute as constitutional as construed and acted upon, because as so construed it was in conflict with the first section of the 14th Amendment, and that the court had approved this statute so construed and acted upon when it brought about a double ad valorem taxation. (Tr. 93, sections 51-53.) And that in this connection the court erred in refusing to find that tangibles must be assessed locally, and can not be assessed under the term of intangibles. (Tr. 94, section 55.) And again, the matter being repeatedly emphasized, that the court erred in refusing to apply the principle stated above, it being indisputably shown that the Board had denied the plaintiffs due process of law, in violation of the first section of the 14th Amendment, and the equality therein provided. (Tr. 95, section 66.)

The case being carried to the Court of Civil Appeals, the intermediate court, all of the above positions were maintained, and as above, the statute as construed by the Board held to be unconstitutional, if so construed; but the court was of the opinion that that was the wrong construction; that the Board did not have the power to value tangibles as intangibles; that they had proceeded on this wrong apprehension; that if the statute had that meaning it would be unconstitutional, and, therefore, it reversed and rendered the case for the plaintiffs.

The defendants filed a motion for a re-hearing in the Court of Civil Appeals, maintaining their proposition that the Court of Civil Appeals was in error in holding that tangibles could not be assessed under the term of intangibles, *i. e.*, that it was the duty of the Tax Board to deduct the assessed valuations from the total valuations, and the residue would be intangibles—not taking

into regard proved equalization of the local Boards down to the undervaluations of other persons, and disregarding the fact that the plaintiffs had a right to render the property on the basis of this undervaluation under the guarantees of the State Constitution. (Tr. 417-422, section 1.)

On the motion for a re-hearing the Court of Appeals wrote an additional opinion as to the insistence that tangibles should be valued as tangibles, and stated that that theory could not be adopted, and held that such construction of the statute would make it unconstitutional, and was unwarranted, and that the only intangibles found were so-called merely, and in fact were tangibles. (Tr. 463, near bottom of page.) The defendants then presented to the Supreme Court of Texas a petition for a writ of error, and set out that the case involved the construction and *validity* of Chapter 14, Title 126, R. S. of Texas, 1911 (Tr. 567, etc., near bottom of page, section 1), and under head "A" thereon pursued the theory that the local valuations should be deducted and that the remainder was tangibles, ignoring equalizations, and insisting that the plaintiffs were in error in their contention that the statute was void on this ground. (Tr. A 467-468.) The defendants here, as petitioners for a writ of error, assigned that the Court of Civil Appeals was in error in holding that there were no intangibles, and again presented that there were intangibles on their theory. (Tr. 471.)

The contradictory views of the Court of Civil Appeals and the Supreme Court have been set out above. Pursuing the position taken from the beginning of the case, and developed on the trial in the lower court, that tangibles could not be assessed and valued under the form

of intangibles, the plaintiffs in error here moved for a re-hearing in the Supreme Court of Texas, which was overruled (Tr. 541, 549, 575), and took the position that the construction of the statute by the State Tax Board, the trial court, and the Supreme Court, that tangibles could be valued as intangibles, after having been equalized in thirty-seven counties, was unconstitutional, and in conflict with the first section of the 14th Amendment to the Constitution of the United States, on the grounds repeatedly mentioned. (Tr. 550-1-2-3, section 1; 554, section II, and section VIII of motion, Tr. pp. 563-564; and section XVI, Tr. 568.) This motion was supported by an argument set out in the record. (Tr. 574.) It was overruled. (Tr. 575.) A petition for a writ of error from this court was allowed by Chief Justice Phillips of the Supreme Court of Texas. (Tr. 575-8.) It was allowed upon this point. Assignments of error were filed with the petition, and identified by Judge Phillips. (Tr. 606, bottom of page.) The first assignment sets out that the court erred in denying the correctness of the position of the Court of Civil Appeals that the Board had no power to value tangibles as intangibles, and that to do so would violate the 14th Amendment to the Constitution of the United States. That the Supreme Court had sustained the Board, and overruled the Court of Civil Appeals, and held that the statute as thus construed was valid, whereby the validity of the statute was drawn in question, and whereby equality of valuation and due process of law had been violated. This point is presented in assignments 1, 2, 3 and 4. (Tr. 596-598.) The point was involved throughout, and necessary to the decision of the case. The Supreme Court of Texas thus had the point directly presented, and its collision with the Court

of Civil Appeals has been pointed out. The claims of the plaintiffs in error herein of the unconstitutionality of the statute were three:

(*a*) That it was class legislation—in including only certain persons.

(*b*) That it provided for the taxation of intangibles twice.

(*c*) That as construed by the Tax Board and trial court, and applied, it involved taxing tangibles under the form of intangibles, and thereby double taxation of tangibles, and the taxing of them outside of the counties in which they were.

"*a*" and "*b*" were overruled by the Court of Civil Appeals, and "*c*" sustained. "*b*" was discussed by the Supreme Court adopting the views of the Court of Civil Appeals. "*a*" and "*c*" were overruled by the statement of that court (without discussion) that all the other points on the constitutionality of the statute were overruled. (Tr. 545.) Point "*c*" above is presented under the writ of error. (Tr. 545, marginal page 75.)

II.

Specifications of Error Relied Upon on Writ of Error.

The specifications come to one fundamental error, to wit: That the Supreme Court of Texas has held the intangible tax statute as construed by it (Chapter 4, Title 126, R. S. of Texas) to be constitutional and valid; its validity being drawn in question throughout this case as in conflict with Sec. 1 of the 14th Amendment to the Constitution of the United States, and this error is now specified as follows:

1. The Supreme Court of Texas erred in holding that

Chapter 4, of Title 126, as construed by it, was constitutional, and not in conflict with Sec. 1 of the 14th Amendment to the Constitution of the United States, it holding that such statute was valid when drawn in question in this case, and in particular that the State Tax Board had the power, under such statute, as construed by them, to revalue the tangibles of the railroad, already valued and put upon tax lists by the assessors and equalization boards of the various counties penetrated by the road; and that said statute authorized the Board to distribute this revaluation into the various counties penetrated by the road under the guise of intangibles, and that the Board, under such statute so construed, could value the tangibles and redistribute them as intangibles upon their judgment and view, that the local Boards had undervalued such tangibles, and had underequalized them, and that it was constitutional for the statute to so authorize the State Tax Board to do this and so to treat "intangibles" as an equalizer, and so to provide for a second taxation of tangibles, taxed where they did exist, in the form of intangibles in counties where these tangibles did not exist, although the Constitution of the State, and its statutes, provided that tangibles should be equalized by the county authorities, and by them alone, and the statute having been acted on by the Tax Board under this construction and approved by the Supreme Court of Texas, its validity, as thus construed and approved, was drawn in question as in conflict with the first section of the 14th Amendment to the Constitution of the United States, and as denying to the plaintiffs in error due process of law and the equal protection of the law, and is now so drawn in question and assigned as unconstitutional here.

NOTE: This point was assigned as error in the assignments now stated, which are presented here as specifications of this same error, and which, in their turn, represented positions taken throughout the case, as set out and stated under the first head, 1, above, such assignments having been presented with the petition for the writ of error, to wit:

2. The court erred in failing and refusing to uphold the finding of law of the Court of Civil Appeals, and reversing the same, wherein the Court of Civil Appeals held that the intangible tax statute of the State of Texas (Chapter 4, Title 126, of the Revised Statutes of Texas), did not authorize the valuation of tangibles as intangibles, nor the valuation of tangibles for taxation by the State Tax Board; and wherein the Court of Civil Appeals held that it is clear that the statute has no such meaning and cannot be construed to confer any such power upon the State Tax Board, and wherein it held: "That Board had no power to pass upon, correct, or in any way change the valuation of tangible property as fixed (by the county authorities) in the rendition and assessment of such property for taxation," and wherein that court held that if the statute be construed to give this power to the State Tax Board and to authorize the State Tax Board to apportion such values "among the various counties of the State, as provided in this statute, would be clearly obnoxious to the provisions of the Constitution, which requires tangible property to be assessed in the county in which it is situated. (Constitution of Texas, Art. 8, Sections 1, 8, 11, 14 and 18.)" This court refusing to pass affirmatively upon such point and overruling the Court of Civil Appeals, and thereby construing the statute to mean that the State Tax Board had such power, which ruling upholding the validity of the statute as construed by the State Tax Board is repug-

nant to the first section of the 14th Amendment to the Constitution of the United States, whereby the tangibles of this railway are distributed for taxation into the counties in which they do not exist, contrary to the provisions of the State Constitution (Art. 8, Sections 1, 8, 11, 14 and 18), and the equality of valuation therein guaranteed, and in denial of the protection awarded under the first section of the 14th Amendment to the Constitution of the United States, and of the due process of law and the equality guaranteed thereby; it being admitted and also proved by all the evidence in this case, and found by the Court of Civil Appeals, and not denied by this court (Supreme Court of Texas) that tangibles were so valued as intangibles, and distributed on a mileage basis; whereby, tangibles of this railway will be taxed in counties where they do not exist, and whereby its tangibles will also be taxed in counties where they do exist, having been valued there in accordance with law on equality with tangibles of other taxpayers, and whereby inequality of valuation for taxation necessarily results in an inequality of taxation. (First Assign., Tr. 596.)

3. The court erred in construing the intangible tax statute of the State of Texas (Chapter 4, Title 126, of the Revised Statutes of Texas) in conflict with the construction placed thereon by the Court of Civil Appeals, and in upholding the State Tax Board in its construction and its action, in valuing tangibles as intangibles, and in holding that they could be distributed for taxation into counties where they did not exist, in conflict with provisions of the Constitution of Texas, to wit, of Art. 8, Sections 1, 8, 11, 14 and 18, requiring equality of valuation for ad valorem taxation, and also that tangibles should be valued for taxation and taxes paid thereon, only in counties where they were. The court taking this posi-

tion and making this construction of this intangible tax statute, and thereby ruling that the tangibles of a railway could be so valued for taxation and taxed; whereby the court has affirmed the validity of this statute as thus construed, although repugnant to the first section of the 14th Amendment to the Constitution of the United States as to the due process of law and the equality provided therein; whereby said statute, as thus construed, has been drawn in question (this tax statute so construed not applying to all property in this State, or property of all owners), and whereby, in conflict with such provision, it is ruled that the railway tangibles may be distributed for taxation into other counties, and may be taxed in such other counties; and be again valued and taxed systematically and to an amount in excess of the equal valuation and taxation resting on other owners, and already imposed on the railway's property by valuation and levy by the county authorities. (2nd Assign., Tr. 596, 597.)

4. The court erred; having refused to mention or adopt the construction of the State intangible tax statute made by the Court of Civil Appeals, it having held and construed such statute not to authorize the valuation of tangibles under the form of intangibles, and their distribution into different counties on a mileage basis for taxation; in refusing to hold such statute, as construed and enforced by the State Tax Board, and the Board's action thereunder, void, and all acts thereunder a nullity. Because the State Constitution and statutes provide for the valuation and taxation of the tangibles in the counties where they are, that is, of the tangibles of all persons; and because, in holding railway tangibles can be valued by the State Tax Board and distributed on a mile-

age basis to any extent as valued and distributed by the Board to some extent (they having been equally valued and taxed by the county authority), the first section of the 14th Amendment to the Constitution of the United States is violated, and the State intangible tax statute, as construed and enforced by the State Tax Board, and that action maintained by the Supreme Court of Texas, is repugnant to the first section of the 14th Amendment to the Constitution of the United States, in that equality before the law and due process is violated; because the tangibles of the railway had already been valued and placed on the tax rolls for taxation by the Tax Assessors and Boards of Equalization of the different counties, on an equality of valuation with the tangibles of other owners, and because tangibles are again taxed on an additional valuation, in excess of tangibles of other owners, and this enforcement of the statute so construed is in violation of Sections 1, 8, 11, 14 and 18 of Art. 8, of the Constitution of Texas, by depriving this railway of the equality and guarantees thereof, preserved for other owners, and in violation of the requirements of the statute of Texas relating to tangibles, taxed and valued for taxation locally, preserved to other owners, all as provided in Chapters 11 and 12 of Title 126 of the Revised Statutes of Texas; and therefore of the first section of the 14th Amendment to the Constitution of the United States (3rd Assign., Tr. 597, 598.)

5. The court erred in adopting the construction of the State Tax Board of the intangible tax statute, in conflict with the construction thereof given by the Court of Civil Appeals in this case, or after so construing the statute, in refusing to hold it void; and in enforcing it and the acts of the State Tax Board thereunder, whereby

the validity of the statute, as construed by the Supreme Court of Texas, is drawn in question as being repugnant to the first section of the 14th Amendment to the Constitution of the United States; the construction of this court (or its refusal to set aside the construction and action thereon of the Board), and of the State Tax Board, and bringing about systematic inequality of valuation and taxation of property of this railway in comparison with valuation and taxation of property of other owners, valued and taxed under other laws, preserving the equality guaranteed by the State Constitution. (4th Assign., Tr., 598.)

III.

Brief of the Argument.

Our brief in support of our petition for a writ of certiorari covers statements and points of that petition. Any inclusion of the point presented here in that brief must be ascribed to the general entanglements, and to the view, if taken, that the action now dealt with was a mere usurpation, coming under certiorari. But this action was in pursuance of the statutes, as we understand its construction by the ultimate State Court. Although we present the point under several specifications and assignments, so that the court, if necessary, may look at it from slightly different angles, yet there is but one point presented herein, and therefore we consider it comes under this writ, because the validity of a statute of the State of Texas was drawn in question as in conflict with Section 1 of the 14th Amendment to the Constitution of the United States, and its validity was upheld as construed by the Supreme Court of Texas, the ultimate

State Court, and the statute so construed was acted on to the injury of the plaintiffs in error. (Dankhe, etc., Co. v. Bondurant, 257 U. S. 282.) The points made in the petition for writ of certiorari are equally well supported, but it is proposed in this brief, notwithstanding the entanglements of the situation, to avoid as far as possible any crossovers into the matters under the petition for the writ of certiorari. However, it is respectfully suggested that both briefs should be taken together in order to have a clearer comprehension of the whole case. After all, the case is one whole.

The material portions of the statute, the validity of which was upheld, are set out immediately below. The point now made is this:

That this statute, providing machinery for the valuation of intangibles of railroads, and a few others, for taxation, and the apportionment thereof among the counties on a mileage pro rata, as construed and upheld by the Supreme Court of Texas (in direct conflict with the Court of Civil Appeals of Texas, the intermediate court) must be construed as the Supreme Court of Texas has construed it; and that, as so construed and enforced by that court, upholding the action of the State Tax Board, due process of law and equality before the law, in conflict with the first section of the 14th amendment to the Constitution of the United States, are denied, and it is, therefore, invalid, because, as construed (*a*) it takes the tangibles of the railroad (already valued and equalized under the Constitution and laws of Texas in the various counties, by the Assessors and Equalization Boards of those counties, on whom final jurisdiction is bestowed), and again values those tangibles under the guise of intangibles, treating the word intangibles as an

"arbitrary"; and secretly sets aside the action of the County Assessors and County Boards so as to bring about a second taxation of these tangibles under the guise of intangibles as an "arbitrary."

(*b*) That having so secretly valued these tangibles as intangibles, the State Tax Board was authorized and directed by the statute to distribute these tangibles, under the guise of intangibles on a mileage pro rata among the thirty-seven counties penetrated by the railway, to be a second time taxed under the guise of intangibles, outside of the counties in which they are situated, where they had already been equalized and taxed, and to be a second time taxed on different levies from those of the counties in which they are.

The State Tax Board is constituted by Chapter IV, Title 126, of the last R. S. of Texas (of 1911), and is composed of the Comptroller, the Secretary of State and the Tax Commissioner. It is made the duty of the Board to make a thorough investigation, and they have power to administer oaths and summon witnesses. (R. S. 7410-12.)

The railroads are required to make preliminary annual statements to the Board (R. S. 7416-18), and the Board is then required, upon these statements and any additional evidence, to make a preliminary estimate and serve it upon the railroad, and if there is a protest, set down the cases for hearing. (R. S. 7419.)

The articles of the statute now drawn in question and construed as above by the Supreme Court are 7420 and 7422.

> "ART. 7420. *Same.*—In so far as the other evidenc and information adduced before said State Tax Board does not make it appear to the members of

said Board to be improper or unjust to do so, said Board shall, in fixing the true value of the entire property of such individual, company, corporation or association embraced within the provisions of this chapter, take as a basis therefor the aggregate market or true value of all its shares of stock, adding thereto the aggregate market or true value of all indebtedness secured by any mortgage, lien or other charge upon its property or assets, and the sum so produced shall be deemed and treated as the true value of said entire property. And where the individual, company, corporation or association does business and has property, both within this State and outside of it, in ascertaining the true value of its property within this State, said Tax Board shall next ascertain from said statements, reports and evidence, if any, or otherwise, the true value, in the locality where the same is located, of each such several pieces of real estate situated outside of this State, and of its other properties, if any, outside thereof, and not specifically used in the business of said individual, company, corporation or association, and the aggregate of said value shall be deducted from the gross value of the property as above ascertained; and the result of said deduction and the sum or value thereby obtained shall be deemed and treated as the true value of all property of such individual, company, corporation or association in actual use in its business. Said Tax Board shall then fix the true value of the property of such individual, company, corporation or association within this State, using as a basis and being guided so far as it shall not believe it unjust to do so, by the proportion which it finds to exist between the total lines or total receipts within this State and outside of it, and lines controlled or operated, or the receipts obtained, entirely within this State, so that there shall be apportioned to this State, as the true value of the property within its borders of each individual, company, corporation or association doing business within and outside of its limits, such proportion of

the true value of all the property of such individual, company, corporation or association which is specifically used in its business, as is borne by its total lines or total receipts within this State when compared with the total lines or total receipts both inside and outside the State of Texas. From the entire value of the property within this State, when ascertained as directed by this chapter, said State Tax Board shall deduct *the true value of all the tangible property of such individual, company, corporation or association within this State,* as so ascertained by said State Tax Board, and the residue and remainder of value shall be by said State Tax Board fixed, determined and declared as the true value of the intangible properties owned and held by such individual, company, corporation or association within this State. Said State Tax Board shall apportion the sum of the said total taxable values within this State to the counties in which such individual, company, corporation or association does business, in proportion to the amount of business done in and receipts derived from each such county, except that, in the case of a railroad company, the apportionment to each county shall be in proportion to the line or lines of such individual, company, corporation or association therein. In apportioning the values of the aforesaid properties said State Tax Board shall have the right, and it shall be its duty, to make use of and consider all evidence which may be put before it, and all material facts at its command; and, if it shall believe that some method of calculation other than that specifically prescribed in this chapter is necessary in order to produce just and lawful results said Board shall follow that method of calculation which it believes best calculated, under all circumstances, to bring about a just, fair, equitable and lawful valuation and apportionment of such property."

"ART. 7422. Board to certify amount of intangible assets to assessors. Thereafter, and not later than the twentieth day of June of each year, said

State Tax Board shall make, in accordance with the provisions and requirements of this chapter, a final valuation and apportionment of the intangible assets aforesaid, of each and every such individual, company, corporation and association, and shall as soon after such twentieth day of June as practicable, certify to the tax assessor of each county in this State to which any portion of such intangible assets of any such individual, company, corporation or association is found by said Board to be apportionable for taxation and so apportioned, the amount thereof, as fixed, determined and declared by said Board, and thereunto apportioned by said Board, together with the name and the place of residence or place of business of the owner or owners of the property embraced in such valuation and apportionment; provided that such final valuation and apportionment of such intangible assets, properly apportionable and apportioned by such said State Tax Board to any unorganized county shall be by said Board so certified to the tax collector of the county to which such unorganized county is attached for judicial purposes. It shall be the duty of the tax assessor of such county, upon receiving such certificate or certificates of said State Tax Board, to place, set down and list upon forms prescribed by the Comptroller of Public Accounts for such purpose, upon the tax rolls of his county, and of each unorganized county which is attached to his county for judicial purposes, as the case may be, any and all such intangible assets, at the value so fixed, determined, declared and certified by said State Tax Board. Such county tax assessor shall extend and prorate upon said rolls the State and county taxes upon all such intangible assets in the same manner as taxes upon other property are extended and prorated. Said assessment, valuation and apportionment of such intangible assets so fixed, determined, declared and certified by such State Tax Board shall not be subject to review, modification or change by the tax assessor of such county, nor by the Board of Equalization of such

county; and the State and county taxes thereon shall be collected by the tax collector of such county and accounted for by him in the same manner and under the same penalties as taxes upon other property. All State and county ad valorem taxes upon all intangible property in this State belonging to any individual, company, corporation or association embraced by this chapter shall be assessed under its provisions and not otherwise; but ad valorem taxes upon all other property of any and all such individuals, companies, corporations and associations shall be assessed as is now or as may hereafter be provided by law."

The applicable portions of the State Constitution are the following:

Sec. 19, Art. I:

"No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Sec. 1, Art. VIII:

"Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law."

Sec. 3, Art. VIII:

"Taxes shall be levied and collected by general laws and for public purposes only."

Sec. 8, Art. VIII:

"All property of railroad companies shall be assessed, and the taxes collected in the several counties in which said property is situated, including such of

> the roadbed and fixtures as shall be in each county. The rolling stock may be assessed in gross in the county where the principal office of the company is located,"

then, provided that the assessment of the rolling stock shall be apportioned to the several counties on a mileage basis.

Sec. 14, Art. VIII, provides for the election of an assessor for each county.

Sec. 18, Art. VIII:

> "The Legislature shall provide for equalizing, as near as may be, the valuation of all properties subject to or rendered for taxation (the County Commissioners' Court to constitute a board of equalization); and may also provide for the classification of all lands with reference to their value in several counties."

Sec. 18, Art. V, near end.

> "Each county shall in like manner be divided into four Commissioners' precincts, in each of which there shall be elected by the qualified voters thereof one County Commissioner, * * * the County Commissioner so chosen, with the County Judge, as presiding officer, shall compose a County Commissioners' Court."

Chapter 11, Title 126, of the Revised Statutes, provides for the rendition of property for taxation to a Tax Assessor of each county; each person to list his property. It is constantly insisted by our opponents that in listing his property for taxation each taxpayer swears to any valuations he makes of his property. Taxpayers in Texas do not swear to the valuations which they suggest, as all property is undervalued, and as is judi-

cially known. (Cummings v. Bank, 101 U. S. 157; Railroads v. Board, 85 Fed. 309; Trustees v. Guenther, 19 Fed. 399; Board v. C. B. & Q. R. R., 44 Ill. 238-9.) Section 1, Article 8 of the Constitution of Texas, provides that taxation shall be equal and uniform, therefore to swear to valuations requested as true values deprive the taxpayer of equality. The insistence of our opponents is that the State Tax Board having been authorized by R. S. 7420, quoted above, had a right to take the valuations made in the counties, and aggregating these, deduct them from the total valuation of the road, and that the remainder would be intangibles, and that the word intangibles was an arbitrary equalizer. They dwell on the provision of R. S. of Texas 7420, above, that the Board, after excluding all property outside of the State (none is here involved), should "deduct the *true* value of all the tangible property of such individual, company, corporation or association within this State as so ascertained by said State Tax Board, and the residue and remainder shall be by said State Tax Board fixed, determined and declared as the true value of the intangible properties owned and held by such individual, company, corporation or association in this State." In the case of a railroad company, the Tax Board apportions these intangibles to the several counties penetrated by the road on a mileage basis. This brings us to the crux of the whole matter.

Our opponents take the position that the word intangibles is an "arbitrary"; that the statute was an equalizer, and that the State Tax Board had a right to take the valuations made by the Commissioners' Court and the suggested valuations made by the railroads as equalized by the Commissioners' Court, and aggregate

these and deduct them from the total value of the road, and so get intangibles as an arbitrary (adding to the valuations, if they think fit), in order to make an equalization of tangibles secretly; although the State Constitution placed this equalization of tangibles exclusively with the Commissioners' Courts of the different counties, with the exception of rolling stock, to be valued at the domicile of the road, as appears above; and that they can do this not on the presumption that the equalizations of the Boards of the counties were right, but on these secret findings that they were wrong.

The Supreme Court of Texas has held that intangibles are, in their nature, so difficult to localize that they may be valued by the State Tax Board (M. K. & T. v. Shannon, 100 Texas, 379); but with this exception, and the constitutional exception of rolling stock, all tangibles must be valued locally and equalized locally.

R. S. of Texas 7518 and 7524 set out the requirements of the renditions to county assessors. R. S. 7520 covers rendition of real estate. The statute covering intangibles of railroads removes them from under the sweeping provisions which would require these intangibles to be rendered locally. (This case, Court of Civil Appeals, 197 S. W. 1050.) There is nothing in the record that shows that any of the values made to the local assessors by this railway were sworn to. If the statute had required the values to be sworn to and submitted as the valuations proposed to be taken for taxation, as pointed out above, it would be unconstitutional, because the provision is that valuations shall be equal, and that the County Commissioners' Court shall equalize these valuations. Values are submitted in a list, but as those the taxpayer suggests, not in any sense as the true values.

It was attempted on the statute book to bring about valuation of properties locally at their true values, a provision universally disregarded as admitted herein, and as known to all men. (R. S. 7530.)

As found by the Court of Civil Appeals and as pointed out below, the true physical values of this road were greater than the total amount of physicals and intangibles found by the Tax Board. (Tr. 463.)

In pursuance of the provisions of the State Constitution, the Commissioners' Court of each county (with the exceptions of rolling stock and intangibles of railroads and those of a few others), are constituted Boards of Equalization, and it is made their duty to equalize all valuations with the exceptions stated. (R. S. of Texas, 7564.) Sub-section 6 thereof is as follows:

> "The assessors of taxes shall furnish to the Board of Equalization, on the first Monday in May of each year, or as soon thereafter as practicable, a certified list of names of all persons who either refuse to swear or to qualify or to have signed the oath or affirmation as required by law, together with the assessment of said person's property made by him through other information; and the Board of Equalization shall examine, *equalize and correct* assessments so made by the assessor, and when so revised, *equalized and corrected*, the same shall be approved." (Acts 1879, p. 44; amend 1859, Sen. Jour. No. 108, p. 486; amended Acts 1909, p. 373.)

The right of equalization is enforced by the Supreme Court of Texas, and, of course, not in question here, as the Constitution settled the right (Section I, Article 8, above).

The action of these County Boards is final, as much as the State Tax Boards, and, therefore, can only be re-

viewed by a suit for injunction (Johnson v. Holland, 17 Texas C. A. 210, and 43 S. W. 71). How, then, can another Board with a different jurisdiction review and set aside their findings or assume their functions to value tangibles, which are exclusively committed to them, just as much as the intangibles are exclusively committed to the State Tax Board? And therefore cannot be equalized by the County Boards to the undervaluations of tangibles made by them, but will be equalized downwards to the county scale by the courts after distribution on the mileage basis. (Lively v. R'y, 102 Texas, 546.) Therefore, no more could the State Tax Board review their action in valuing tangibles, by undertaking to say that they had not valued them high enough and by disguising tangibles in intangibles, and disregarding the equalization of the County Boards.

It is to be presumed until the contrary is shown that the County Commissioners' Court have equalized all property on the right basis; that is, equalized values in the county justly and on a general parity one with the other.

The theory of the State Tax Board was, therefore, that the statute authorized it to take the railroad's equalized physicals, and not merely to deduct them, and consider the balance as intangibles, but to adjust them to any figure they wished, below real value, and then make the deduction, with a view of putting additional tangibles in the guise of intangibles. It is admitted that the intangibles, so-called, would be an "arbitrary" and not real intangibles. One can see at a glance that this would result, not only in disregarding equalization and depriving the taxpayer of the benefit thereof—against the Constitution—but also in a second time taxing these tan-

gibles, and in counties where they did not exist, when distributed on a mileage pro rata, secretly and against the State Constitution, and of course to be taxed at different county rates, from those of the counties wherein they are.

It seems useless to enter into any extensive discussion of the illegality of such a process; it appears on its face not only to be in defiance of the Constitution of Texas, but also of the first section of the Fourteenth Amnedment to the Constitution of the United States.

The Court of Civil Appeals found, upon an exhaustive investigation, that there were no intangibles whatsoever; that there was no evidence or basis of any, unless the statute be construed to authorize the Board to do what it did do and find tangibles as intangibles. We have shown under the first head of this brief how this question was raised, and set out the emphatic language of the Court of Civil Appeals whereby it is held that this is not the true meaning of the statute, but if the meaning, that the statute would be unconstitutional. (Tr., bottom page 411 and page 412.) The court points out that this is absolutely a wrong method; declines to believe (in conflict with the Supreme Court of Texas) that it was authorized by the statute, but points out that whether authorized or not authorized, such a method, statutory or not statutory, is in conflict with the Fourteenth Amendment to the Constitution of the United States, and quotes from Cummings v. Bank (11 Otto, 153); and cites Railroad and Telephone Companies v. Board (85 Fed. 305), wherein it is said: "If the Board of Equalization was under a duty to equalize, a mistaken view that such was not its duty would not change the law

and could not render a result legal which would otherwise be illegal."

Here we have on a reverse situation an application of the same principle, where the Board on an equally mistaken view claimed that it had a right to bring about a double valuation and double taxation under the guise of equalization. (Tr. 413.) The court also quotes from German National Bank v. Kimball, 13 Otto, 732), to the effect that if a statute is so shaped (as this one is on the construction of the Supreme Court of Texas) as to discriminate injuriously against any class of persons or property, relief should be awarded as well as when if the statute be unobjectionable the officers administering the tax statute did it on a wrong principle. That they have done it on a wrong principle is presented under our application for a writ of certiorari, as complementary to this writ of error, but the Tax Board and the State claim that they have merely followed the statute, therefore, we attack this statute as unconstitutional on such construction.

What is the use of multiplying authorities? The point has been too often decided to admit of discussion. The Court of Civil Appeals analyzes the evidence to determine whether or not the Board gave this construction to the statute, and whether or not they acted on that construction. There is an extensive discussion in the opinion of the formulas relied on by the Board. These formulas are completely demolished and are sufficiently discussed in our brief on the writ of certiorari. The Court of Civil Appeals says: "Our conclusion of fact, after the consideration of all of the evidence, is that the international & Great Northern Railway Company had no intangible property taxable under the laws of this

State when the taxes sought to be enjoined were assessed thereon, and the finding by such State Tax Board was an arbitrary finding of such values as did not exist." (Tr. 410, marginal paging 556.) All of the facts plead by petitioners in error here, as to values of tangibles and to the nonexistence of intangibles, are stated by the Court of Civil Appeals to have been proved by indisputable evidence in the following emphatic language: "All of the facts above stated were shown in the trial in the court below by undisputed evidence." (Tr. 406, marginal paging 551.) Therefore, the Court of Civil Appeals, in its original opinion and as repeated in the opinion on motion for rehearing, found:

That the Board's only basis was to value tangibles as intangibles on the principles set out above (Tr. 411, near bottom of page, and 412), and in the second opinion the court used this emphatic language:

> "Unless we adopt appellees' theory that the Tax Board is authorized, under the intangible statute of this State, to assess as intangible values the value of tangible property of a railroad, in excess of the value for which the tangibles are assessed for taxation, or that such Board can make an 'arbitrary' finding of intangible findings, the finding of the Board that the International & Great Northern Railway Company had intangible property of any value at the time of the assessment in question was made can not be sustained. We can not adopt either of these theories of appellees, and feel constrained to adhere to the conclusions stated in our main contention." (Tr., 463.)

The Supreme Court of Texas is only authorized to pass upon points of law, not points of fact. Sec. 6 of Art. 5 of the State Constitution provides: "The decisions of

said Court (of Civil Appeals) shall be conclusive of all questions of fact brought before them on appeal of error." Revised Statutes of Texas 1590 provides: "Judgments of the Court of Civil Appeals shall be conclusive in all cases on the facts of the case." These provisions have been often maintained. (Gueste et al. v. Galveston Tribune, 105 Texas, 508; Pollock v. Railway, 103 Texas 772; Baumon v. Jaffrey, 86 Tex. 618; weed v. Telegraph Co., 107 Texas 253-4.) The Court of Civil Appeals states that: "The pleadings of the defendants, and the testimony of the Tax Commissioner, show that the Board construed the statute as authorizing it, when it deems the rendition of the physical properties of a railroad for taxation has been made at a valuation of less than its fair and just value, that it is authorized to add to this value by an 'arbitrary' fixing of intangible values of such railroad." (Tr. bottom page 411 and top of page 412.) This, therefore, under the laws of Texas is conclusive, and it is submitted that this court does not have to look any further than the opinion of the Court of Civil Appeals and apply the law to the facts of that opinion. The question being, is the Court of Civil Appeals correct in holding the statute unconstitutional on the construction of the Board, or is the Supreme Court correct in holding it constitutional?

But I go further, and will now show from the pleadings and the record that there is no doubt whatever that the Board included and intended to value tangibles under the "arbitrary" of intangibles.

In the pleadings in this present case and throughout all the contentions, the defendants took the position that the Board had the right to make this adjustment under what they called a system, by deducting the tangibles

found by the County Boards, or any private adjustment the Board should make of the tangibles rendered without regard to equalization; and that the remainder, when this deduction was made from the total value of the road were to be classed as intangibles, but not by the Board found to be intangibles, but in fact known by the Board to be tangibles. This has been sufficiently set out above under our first head, but we call attention to their summation in the answer, wherein they say: "Defendants say furthermore that whenever this classification has been made by the railroads themselves, it is appropriate for the remainder of their property to be classified as intangibles." (Tr. 35, second paragraph from top.) The railroad's agent did not swear to the values, but to the list of property, suggesting such values as he claimed for equalization purposes.

Perhaps our opponents were lead into this error by the former condition of the statute. The act as it now stands was modified by the Legislature so as to provide that the value of the tangibles—not the assessed value—should be deducted, as appears in Act set out above, which is of 1907. The Act of 1905 provided that, to arrive at intangibles: "From the entire value of the property within the State, when ascertained as directed by this Act, the said Tax Board shall deduct *the assessed value for taxation* of all of the property and assets of said individual, company, corporation or association, as the same is *found to be assessed for State and county taxation*, in the locality where the same is locally taxable, and the residue and remainder value, shall be, by the State Board, fixed and determined as the true value of the unassessed franchises and intangible properties owned and held by said company." Section 7, Act of

1905, approved April 17, page 355 of the General Laws of the State of Texas, Regular Session of that year. Of course, the statute as it stood in the Act of 1905 was unconstitutional, at least if anyone would show that the equalization of tangibles by the local Boards was down to local parity between tax values, as in 1907 hinted by the Supreme Court of Texas, and as shown set out hereunder, and this was perceived by someone, and these words changed to: "From the entire value of the property within the State, when ascertained as directed by this chapter, the State Tax Board shall deduct the *true value of all the tangible* property of such individual, company, corporation or association within this State, as so ascertained by State Tax Board, and the residue and remainder of the value shall be, by said State Tax Board, fixed, determined and declared as the true value of the intangible properties." (From R. S. of Texas 7420, quoted above.)

The Board and Mr. Bagby admit that they did not deduct the true physical values, but only a portion thereof; they insisting that they did not have to deduct the true value of tangibles, but were authorized by the statute to value tangibles as intangibles. Therefore, it is an astonishing thing that the Supreme Court of Texas takes the position that the change in the Act had no effect, and that the Act remains as it was written in 1095, which, of course, would make it absolutely unconstitutional, in conflict with both the Constitution of the United States (first section of the Fourteenth Amendment), and with the Constitution of the State of Texas, at least when it is admitted that the deduction was not complete of the value of tangibles as here.

Under head "I." we have traced how this question

was raised, and shown how, on the trial, the pleadings in the previous case in the Federal Court were introduced, wherein the State Tax Board, Mr. Bagby swearing thereto, plead that the intangible tax statute provided for adjustments, and that the word "intangibles" was an "arbitrary," and that they had the right to value tangibles under the form of intangibles. The suit in the Federal Court was against the whole Tax Board, to prevent them from certifying their findings, but a temporary injunction was refused, without prejudice, all as set out above. In their special pleadings in that court, the Board set out that the Legislature had enacted elaborate laws to bring all property under taxation, and that its purpose in the intangible tax law was to commute the occupation tax in favor of railroads paying taxes upon intangibles, but not in favor of those not paying such tax, and that the Board was to have a discretion to find the true value of the entire property, but that the subtraction of the physicals from the value of the whole "was to represent the valuation to be taxable under the Act, under the general term 'value of intangible property,' and that the object of the Legislature was to supplement the old statute and to cause underassessment of property held by the railroad companies, *by whatever name, of whatever character, to be taxed*" (Tr. 348, and 349, near bottom), and that "*whether called arbitrarily tangibles, intangibles or mixed, all the property is subject to taxation*" (Tr. 350, 2nd paragraph), and that it made no difference how the property was named, provided the Board did not find in unreasonable excess of the true value. (Tr. 350.) And, coming specifically to the point, they plead that the railways and the Receivers had rendered the physical properties in

the counties for so much, and that having found the true value of the entire property, it was the duty of the Board "next to ascertain the value at which the property had been assessed in the various counties, and then subtract the assessed value from the true value, and the result to represent the value to be assessed under the *general and undefined term,* 'value of intangible property.'" (Tr. 349.) Then the Act of 1905, which had been modified as set out above, is referred to; and it is insisted that, in 1907, the Legislature commuted the occupation tax on the basis of the Act of 1907, whereby, as stated above, such arbitrary residue "was to represent the valuation to be taxable under the Act, under the general term "value of intangible property." (Tr. 349.) Mr. Bagby, State Tax Commissioner, swore to this pleading in the Federal Court "that he had read it, and that the statement of facts therein contained was true on his own knowledge, or on information and belief." Of course, the method of finding intangibles was on his own knowledge, as he is a member of the Board. (Tr. 354.)

On the trial Mr. Bagby, State Tax Commissioner, and member of the State Tax Board, who found these alleged tangibles, was placed on the stand by the defendants, but on cross was examined upon these pleadings, and admitted his affidavit, and also stated that the pleadings were signed by Mr. Terrell, the Comptroller, and Mr. McKay, Secretary of State, the other members of the Board, individually, and not by the lawyers for them, and said that he casually read the answers, but that he told the lawyers the facts (Tr. 365, near bottom of the page), and that he knew what was therein, and that he would not swear to anything without knowing what was in it if he could help it, and that this answer fairly shows

to a certain extent the theory of the Board, and that to the best of his knowledge and belief, everything in the answer was true.

"The witness was requested to return to Sec. X of the answer. This section is as follows:

> "Defendants, therefore, allege that the true taxable values of the entire properties of the complainants within the State far exceed the sum of $24,627,433.00, the amount of such values that will be subjected to taxation by the complemental action of the State Tax Board and the various county taxing officials, and that the value of said properties, subject to assessment for taxation by the State Tax Board, under the general and arbitrary designation of 'value of intangible properties,' far exceeds the sum of $10,743,223.00, the amount of the final valuation thereof by the State Tax Board."

The witness was asked whether or not what was stated in this Sec. X was true, according to his understanding, and he said that it would place him in a very embarrassing position, but that as far as the Board was able to understand $10,743,000.00 represented the intangible assets of the railway. The witness first said that he did not regard the words in Sec. X "value of intangible properties" as an arbitrary designation. That he denied that statement to a certain extent. And further, "That is an arbitrary designation; yes, sir; in as far as the I. & G. N. is concerned." That he did not think that the word "intangibles" in the statute was necessarily an arbitrary designation, and he did not think that the finding of intangibles was an arbitrary finding. The witness was asked to turn to Section V of the pleading in this answer summarized above, and was asked wheth-

er these words in Section V correctly stated his definition and understanding of the guidance in the statute, to wit: 'The purpose of this statute was to carry out the plain language of the Constitution, and to cause to be placed upon the tax rolls every element of property by whatever name known, hitherto and otherwise escaping taxation by reason of non-assessment or insufficient assessment by county officers.' That the witness answered that so far as he was personally concerned he tried to put on all the intangibles of the railway company that he could. The witness was asked this question, quoting from the pleading: Whether or not it was his purpose to tax "all property hitherto and otherwise escaping taxation by reason of the non-assessment or insufficient assessment by the county officials"? the pleading stating that this was the purpose of the statute, and he answered—"The last part of it, no, sir; I tried to place upon the railway company all taxes I thought was due by them, not on account of the insufficient assessment of the county officials," and he said that that was an incorrect statement. There was then read to the witness from the pleading what next follows in quotation marks, and the witness was asked, "Did you or not try to reach a result which result represents the additional value to be taxed, under the general and undefined term 'value of intangible property?' Did you try to do that? A. Yes, sir; I tried to get all the intangible properties of the railway company."

"The court asked the witness this question, whether or not in making the assessment of the I. & G. N. R'y the Board arrived at the true value of the entire property and deducted therefrom the amount assessed by the proper authorities against the tangible property and

took the balance as intangibles and assessed it as such. This question was objected to by the defendants, and over their objection and exception was insisted upon by the plaintiffs, and the witness answered that the railroad made affidavit to the actual value of the railroad in the counties exclusive of rolling stock $26,000,000 and the rolling stock $2,346,000.00, and that that was the way 'We arrive at the value of the railway,' that it was not done as stated in the court's question. The witness was asked whether or not he understood and applied this statute as set out in the pleadings, that is, the intangible tax statute wherein at the end of Section V, it was stated that it was intended to supplement the old statute, and to cause every element of property held by the Railroad companies by whatever name, to be taxed as manifested from the statute itself as construed by the Supreme Court in M. K. & T. R'y v. Shannon, 100 Texas, 479.

"A. Yes, sir, just as it is stated there, as far as the intangible assets, yes, sir."

"The witness was requested to begin at the head of Sec-VI and extending to Sec. VII and his attention was called to these words next placed in quotation—"that the purpose of the legislature was to secure the placing of all property upon the tax rolls," and "of all the elements of property not otherwise assessed." "The method of calculation, or formula, used by the State Tax Board in arriving at its valuations, is wholly immaterial, so long, at least, as such final valuation does not result to place a total valuation upon the tax rolls unreasonably in excess of the true total value of all property subject to taxation." The witness was then asked—"You understood the law to mean that, didn't you, and acted on that principle? A. Yes, sir."

"The witness said that he would say now what he had said in the Federal Court, that his conduct in making this assessment was based upon all of the documents before him, as well as the formula, but principally upon the formula, and that that was substantially correct, and that he furthermore would say, as he said in the Federal Court, that what he intended to do was to get the corrected true value and to make the intangibles a fair representation of the residue of the property, and that he did not regard the intangibles as anything more than arbitrary, and under the term "intangibles" including the residue of the property. The witness said that that was correct, to a certain extent, and that he had answered in the Federal Court that it was correct, to a certain extent, and furthermore, that he now stated, as he stated in the Federal Court, that the finding of the value of the intangibles at $10,743,223.00 did not represent the intangibles strictly defined, but represented the tangibles taken arbitrarily, to a certain extent. (Tr. 336-8.)

The formula and formulas are discussed in the opinion of the Court of Civil Appeals (Tr. 400), and our brief with petition for certiorari. By the above and the first section of this brief (I), it appears that not only was it the theory of the Board that they could value tangibles as intangibles, but they absolutely did this. Consequently, if this court goes behind the findings of the Court of Civil Appeals that this was done, it was shown on the indisputable evidence that it was done. As appears under "I" of this brief, this point was pushed through the whole case and into the Supreme Court of Texas. It was a cornerstone of our case, as it has been throughout. Commissioner Spencer, however, giving the opinion for the Supreme Court of Texas, only discusses

one of the attacks on the constitutionality of the statute, and affirms the position of the Court of Civil Appeals thereon, to wit: that the statute was unconstitutional in providing that tangibles, as such (not tangibles under the form of intangibles) should be taxed valued and taxed. On this point he concurs with the Court of Civil Appeals, and we do not present that as error. (Discussion of the Court of Civil Appeals of this point, Tr. 414, 415, and by Commissioner Spencer concurring with the Court of Civil Appeals, Tr., commencing last paragraph 545-547.) This, therefore, is the only constitutional point discussed in his opinion. As to the other points including this, the opinion states: "Plaintiffs contend that the act is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and various provisions of the Constitution of this State. With but one exception, to be presently discussed, ALL THE OBJECTIONS raised were considered in M. K. & T. R'y of Texas v. Shannon (100 Texas 379), and decided adversely to plaintiffs' contention." (Tr. 545, beginning at marginal page 751.)

The one exception referred to is the one we have just mentioned, on which no point is made here. Commissioner Spencer and the Supreme Court in adopting his views are in error, that our position was disposed of in the Shannon case. But if we are mistaken in so thinking, then the Shannon case has declared an Act to be constitutional when it is unconstitutional and in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States. Undoubtedly Commissioner Spencer and the Supreme Court of Texas adopted the view that the taxation of tangibles under the form of intangibles is provided for in the Act, and that the

Act so providing is declared to be constitutional by the Shannon case. We now examine that case with attention (100 Tex. 379):

Shannon, Sec. of State Stevens, and Comp. Davis, Tax Commissioner, constituting the State Tax Board, were sued by the M. K. & T. R'y to enjoin them from acting under the Intangible Tax Statute of 1905, above referred to, and in the trial court demurrers were sustained against the railroad which were affirmed in the Court of Civil Appeals and writ of error taken from the Supreme Court, and so the case carried into that court. (100 Tex. 387.)

We omit the discussion of the jurisdiction of the District Court and come to the point of the case (2nd paragraph from bottom page 388), which was: Was the Act invalid under the Constitution of the State or that of the United States? The discussion of the court on pages 388 and 389 down to the bottom paragraph of 238 is omitted as not relevant to the matter in hand. Commencing at that paragraph the court ruled that the Constitution of Texas required all property to be assessed and taxes thereon to be paid in the COUNTY WHERE IT IS SITUATED, with the exception of course, of rolling stock, as pointed out above (pp. 389, 390), and the court also found that this intangible property is of such a metaphysical nature that it would not be contrary to the Constitution to consider it as an exception, as not located in any specific county. (Pages 390 and 391.) The court also takes up the provision of the Constitution that taxes should be equal and uniform, and the difficulty arising that the valuation of the tangibles was committed to the County Boards and of the intangibles to the State Board, the court meets this

by stating the Act provides for no rate of taxation, but merely for valuation, and that when ascertained the owners of the property will pay taxes at precisely the same rate as others; that all property, as is provided by the Revised Statutes, should be assessed at its full and true value, and that it follows, IF THE LAW IS PROPERLY ENFORCED, nobody will be hurt because the State Board will value intangibles at their full value and the county authorities tangibles at their full value; and that the provision of uniformity does not mean that the same officers shall be entrusted with the value tion of all property. (100 Tex. 392, 393.) The court then discussed the Act of 1905 as cited and quoted above, but now changed wherein it is provided the Board having ascertained the true value should deduct the TRUE (not assessed) value of the physicals, and the remainder be intangible. Then on page 396 the court says that it is insisted that the authorities of the counties habitually assess the property at less than its true value, namely from one-fourth to two-thirds thereof, and that the operation of the Act will result in unequal taxation. But as to this the court says: "BUT WE MUST PRESUME THAT THESE OFFICERS WILL DO THEIR DUTY AND WILL OBEY THE LAW. IF THE LAWS FOR TAXING PROPERTY BE FOLLOWED no inequality can result. If the County Assessors insist or persist in assessing the properties in their respective counties at less than their value, it seems that the plaintiff company is not without remedy." (Cummings v. Merchants National Bank, 101 U. S. 153, referred to.) So it appears that the Supreme Court of Texas has applied the Act of 1905, which has been modified, as stated above, and it was made the duty of the

State Tax Board not to deduct the aggregated tax renditions, but to deduct the true values. Of course, as soon as it would be shown, in any specific case, that the equalized values in the county were brought down on the basis of other persons, then it would become absolutely unconstitutional to deduct such equalized values enormously under true values, for if that was done the constitutional right of equalization would be made nugatory, and tangibles in the form of intangibles as an arbitrary distributed for taxation outside of the county in which they were, which the court had just decided could not constitutionally be done. (*Supra*, 100 Tex. p. 389, near bottom.) As was pointed out above, that property is enormously under-valued, and this is a matter of judicial knowledge. The court winked hard, and gave a broad hint that the statute in working would prove unconstitutional. Commissioner Spencer entirely overlooked the fact that it was shown on this record, and is admitted throughout, that the country values were not the true values, and that the rendered values were not the true values, and the equalized values were not the true values, which were required to be deducted by the Board.

The defendants plead that this was not the case, but that the local Boards did not give the true values, and that the local Boards not having put the true values on the property, the State Tax Board had undertaken to adjust that matter. Therefore, it is stated as a matter of pleading by the defendants, that they were not acting on the presumption that the county assessing Boards had affixed true, full, statutory values, but were acting exactly on the opposite presumption; that they had not affixed the true statutory values. Therefore, they can-

not avail of any presumption that the Board followed the laws and affixed true values because the defendants plead, and testified that they knew they had not, hence that they conceived it their duty and right under the statute to equalize such values under the "arbitrary" of intangibles, and to add to the values of the County Board. If the officers had alleged that the County Boards had affixed true values, following the statute, of all tangibles, as such, and that they had accepted such true values and deducted them from the total value of the property, then that would be in line with the Shannon case, but they killed that by the opposite position in their pleadings and the testimony that they knew these were not true values and that they were setting them aside. By the time of the trial there had been a cooling off from the pleadings, but after usual turnings around on cross, Mr. Bagby made the statement. The Act of 1905, on this point, could only be constitutional, as pointed out by the Supreme Court of Texas, on the assumption that the County Equalization Boards had valued all of the tangibles at their full value, which presumption is, of course, rebuttable. But this is eliminated here, because, as shown above, the State Tax Board knew that these were not true values of the physicals, and set them aside and made some adjustments, and proceeds to value what they knew to be physicals under the form of intangibles (as an "arbitrary"), as an "equalizer." The Board here went up against a wall, for, if it be generally presumed, in the first instance, that the County Boards had valued tangibles at their true value, that is eliminated when it is admitted and claimed that they have not done so. Then next it is to be presumed that the values they placed on them had

been placed under the rule of equalization. Consequently the decision of the Supreme Court of Texas relied on by Commissioner Spencer (the Shannon case), under the facts in this case, is a direct authority against the Commissioner's opinion. For when it is out of the case and admitted on all hands and plead, that the findings of the County Boards of values of tangibles were not true values, then we come around to the situation that they must *be presumed to be equalized* values, as it was the duty of the Boards under the Constitution of Texas and its statutes, as quoted above, to set up such equalized values. So the Shannon case is an authority *contra*, and not supporting. But the statute, as we pointed out, passed upon in the Shannon case was the Act of 1905, and the Shannon case squarely pointed out that the Act would be unconstitutional, whenever it was shown (as admitted and plead in this case), that the County Boards and assessors had not found tangibles at true values, but far under true value. It was universally known and easy to prove that any presumption of their finding true value, if any there was, would always be overthrown upon an actual trial; whereby on an actual trial of the facts (the Shannon case went up on demurrers) the Act of 1905 would undoubtedly prove to be unconstitutional in practical application, as broadly hinted by the court. The Shannon case was ruled in 1907, and immediately thereafter in 1907, the Legislature struck out this provision that the *equalized locally assessed values* of tangibles should be aggregated and deducted, and changed the law to its present status, providing that the *true value* (not the local valuations of the tangibles), should be deducted, and yet Commissioner Spencer and the Supreme Court

of Texas construed the present statute exactly as if the Act of 1905 had stood unchanged. I suppose we must follow their construction, as they are the ultimate State court, and say, as they found, that the Board construed this statute correctly.

Defendants plead and testified that the tangible valuations were not treated by them as true values, but we must assume that they were equalized values and equalized down to the constitutional requirements, and the values of other people in each county. The presumption that the local Boards had valued the property at true values being eliminated, and the defendants pleading that these were not true values, that they had added to the values of the Local Boards in making their deductions, and then still carried a proportion of the tangible values in the form of intangibles as an arbitrary, we are left with a presumption that the Local Boards made these values on equality with the values of other people under their duty to equalize. In the immediate case only taxes on alleged intangibles prorated to Harris County were in question. Under the alternative, the plaintiffs had set out that if they were intangibles they should be equalized in Harris County, but the Court of Civil Appeals found that there were none, so that there was nothing to equalize. It has been frequently held in Texas that after intangibles are apportioned they must be equalized under the Constitution down to where the low rate of valuation prevailing in that county. Upon this alternative an immense deal of testimony was introduced. It is not thought necessary to go into any detail of it here. (Tr. 237 and 317.) No witness testified to any full valuation in Harris County. At least none after cross-examination. Blake, the County Assessor, testi-

fied that he had been in the office as deputy, and now assessor, for 12 years; that as to rural property there is a general system supposed to take it at two-thirds of its value, and other property at various proportions and arbitraries, a percentage of full value, but that a work out was: Rural real estate was not taken at over 40 per cent, and this was done in trying to work to a system of undervaluation, but coming below the figures set for undervaluation. (Tr. 244, 246, commencing marginal page 318.)

A full list of the county renditions and equalizations on railroad physicals in all the counties was shown. (Tr. 324.) As we have set out in the pleadings, our adversaries say (the opposite was the situation in the Shannon case) that this was all incorrect and the equalizations by the Equalization Boards in the counties were incorrect, but they do not anywhere say that they investigated (and they have no power so to do) the equalizations of the County Boards or their bases. They take the opposite position that they did not have to investigate, that they had jurisdiction to value these tangibles under the guise of intangibles, and that they did so, and that the statute gave them that power, notwithstanding the Constitution of Texas, and notwithstanding that this violated the equalizations.

In the opinion of Commissioner Spencer, adopted by the Supreme Court, it is said:

> "The decisions of the Tax Board in the matter of valuations are *quasi* judicial in their nature. This action is, therefore, a collateral attack upon the judgment of a *quasi* judicial tribunal." (Tr. 543, beginning of last paragraph, and 229 S. W., first column, page 495—see .)

But also the decisions of the thirty-seven Boards of Equalization of the counties are *quasi* judicial. What right did the State Tax Board, in finding alleged intangibles have to set aside these findings of Equalization Boards any more than those Boards had the power to set aside the findings of the State Tax Boards as to intangibles, and yet it is quietly assumed that such right existed and that the statute justified this. Commissioner Spencer failed to state the admission of Mr. Bagby, but merely puts down that Mr. Bagby stated that the Board went on everything before then, therefore, on the admitted principle that they could value tangibles as intangibles. Commissioner Spencer admits that the railroad reported as required by law, that its tangibles have been assessed at so much, that they were equalized by the County Boards at so much. He states that in making these deductions on intangibles that the Board increased this equalization, but he does not state that the Board knew and plead that they were not increasing it sufficiently to get *the true value,* as required by the statute, but that they knew that the value was greater and that they included tangibles in their intangibles. (Tr. 544-545.)

We consider that we are entitled on various grounds to the writ of certiorari. But now we are bound to accept the construction of the supreme ultimate court of the State. (Farncomb v. Denver, 252 U. S. 7; 64 L. E. 424.) This court cannot be ousted of its jurisdiction by the failure of an ultimate court of a State, or refusal to pass upon a Federal question when the facts show that the Federal question is necessarily involved in the case. When it is presented as involved, and is involved as shown by an investigation of the case, then the jurisdic-

tion of this court will attach. (Cissna v. Tenn., 52 L. E. 723; 246 U. S. 289, and on p. 294.) Nor can the Federal question be denied or changed by an unsupported finding of fact, and no matter what the State Court may say as to the facts not raising it, if they do. (Dankhe Walker Milling Co. v. Bondurant, 257 U. S. 282; 66 L. E. 239; Merchants Nat. Bank v. Richmond, 65 L. E. 1135; 256 U. S. 635.)

The unconstitutionality of the statute as construed, because in conflict with the First Section of the 14th Amendment to the Constitution of the United States, was presented throughout, that is as construed by the State Tax Board and the Supreme Court of Texas. In the plainest possible terms, as we have shown in the first section of this brief, we endeavored to induce the Supreme Court of Texas to sustain this point. If the Court of Civil Appeals is correct in its construction of the statute, then by a usurpation and without any authority the State Tax Board valued tangibles as intangibles, and we are entitled to relief under a writ of certiorari. But, on the other hand, this statute, as acted on by the State Tax Board, is approved by the Supreme Court of the State. Our attack on this statute on this ground was held in sweeping terms by that court to be unfounded, and we are entitled to relief on writ of error, we having drawn the constitutionality of the statute in question on this ground, and the Supreme Court of Texas having held the statute valid by stating:

> "Plaintiffs contend that the act is violative of Section 1 of the 14th Amendment of the Constitution of the United States, * * * all the objections raised were considered in M. K. & T R'y of Texas v. Shannon (100 Tex. 379), and decided ad-

versely to plaintiff's contention." (Tr. 545, original 751.)

We therefore respectfully pray that the action of the Supreme Court in reversing and rendering this case be set aside, and that the decree and judgment of the Court of Civil Appeals be affirmed, and the defendants be perpetually enjoined from insisting on the collection of this tax, and that if this cannot be done, then that the action of the Supreme Court be reversed, and that such proceedings be decreed to be had as law and justice may require; and that plaintiffs in error have all relief as may be their due.

Respectfully,

SAM'L B. DABNEY,
Attorney and Counsel for Plaintiffs in Error.

INDEX AND LIST OF CASES.

PAGE

Abbreviations 1

Statement of the Nature and Result of the Case..... 1-2

Brief of the Argument..... 2

All Properties Required to Be Taxed Under the Constitution of Texas..... 3

Purpose of Intangible Tax Law to Tax Entire Properties of Railroad Corporations..... 3

Board Vested with Discretion in Fixing Values of Intangibles of Railroad Corporations..... 3

Acts of the Board are Conclusive Unless Fraudulent..... 3

Articles Drawn in Question Set Out in Full..10, 11, 12, 13

Construction of Intangible Law by Supreme Court of Texas 14, 15

Conclusion 43, 44

LIST OF CASES.

PAGE

Acts of 30th Legislature, pages 462-469.....2, 16
Adams Express Co. vs. Ohio, 165 U. S., 114-229..... 36
Constitution of Texas, Art. 8, Sec. 1..... 3
Davidson vs. New Orleans, 96 U. S., 97..... 37
Fargo vs. Harpe, 193 U. S., 490..... 21
Hibben vs. Smith, 191 U. S., 310..... 35
Kelly vs. Pittsburg, 104 U. S., 78..... 36
Maish vs. Arizona, 164 U. S., 500-610..... 34
M., K. & T. Ry. Co. of Texas vs. Shannon, 100 Texas, 379, 100 S. W., 138..... 14
Ohio Tax Cases, 232 U. S., 576..... 29
Pittsburg, etc., R. R. Co. vs. Backus, 154 U. S., 421.....17, 30
Revised Civil Statutes of Texas, 1911—
Arts. 7407-7426..... 10
Arts. 7415-7416..... 10
Arts. 7418-7419..... 10
Art. 7515..... 3
Art. 7517..... 3
Art. 7518..... 3
Arts. 7420-7422.....10-12
Art. 7525..... 3
Sioux City Bridge Co. vs. Dakota Co., 67 L. Ed., 231..... 41
State Railroad Tax Cases, 92 U. S., 575-606.....18, 26
State vs. Austin & N. W. Ry. Co., 94 Texas, 530..... 14
Southern Ry. Co. vs. Watts, 67 L. Ed., 199..... 38
Western Union Telegraph Co. vs. Norman, 77 Fed., 13..... 16
Willoughby vs. Chicago, 235 U. S., 45..... 35

In the Supreme Court of the United States

OCTOBER TERM, 1923

(No. 488, October Term, 1921, and 28,443.)

JAMES A. BAKER, RECEIVER OF THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, ET AL.,
PLAINTIFFS IN ERROR,

vs.

KARL L. DRUESEDOW, TAX COLLECTOR, ET AL.,
DEFENDANTS IN ERROR.

BRIEF FOR THE DEFENDANTS IN ERROR.

ABBREVIATIONS USED IN THIS BRIEF.

Railway Company=International & Great Northern Railway Company.

Board=The State Tax Board of Texas.

Receiver=James A. Baker, Receiver of the Railway Company.

Supreme Court=Supreme Court of Texas.

Court of Civil Appeals=Court of Civil Appeals of the First Supreme Judicial District of Texas.

District Court=District Court of Harris County, Texas.

Record=The transcript of the record.

I.

STATEMENT OF THE NATURE AND RESULT OF THE CASE.

The statement contained in the brief for plaintiffs in error is substantially correct as stating properly the questions involved and the manner in which they were raised, but defendants in error believe that the statement made in the opinion of the Supreme Court of Texas as summarized in respondents' brief on

petition for writ of certiorari contains a more exact statement of the nature of the case and the same is here referred to in so far as it is applicable herein.

II.

Brief of the Argument.

The brief of the respondents on the petition for writ of certiorari covers, we believe, the points presented there, and, necessarily, in our opinion practically all of the points discussed in the brief on certiorari are involved in the discussion in this brief.

The case as said by plaintiffs in error in its brief is after all one whole, and defendants in error ask that the whole case be considered together and that their brief heretofore filed herein on the petition for writ of certiorari be taken and considered in so far as the same may be applicable upon consideration of the points involved here.

Plaintiffs in error contend that the Texas Intangible Assets and Properties Tax Law as passed by the Thirtieth Legislature, Acts of 1907, pages 462-469, as construed and upheld by the Supreme Court of Texas is in conflict with the first section of the Fourteenth Amendment in that due process of law and equality before the law are denied because as plaintiffs in error say, the Board in its processes took the tangibles of the Railway Company already valued and equalized by the assessors and equalization boards of the different counties, and again valued those tangibles under the guise of intangibles, and secretly set aside the action of said boards so as to bring about a second taxation of the tangibles under the guise of intangibles as arbitrary, and secretly valued these tangibles as intangibles. The State Tax Board under the law was authorized and directed to distribute the tangibles under the guise of intangibles on a mileage pro rata among the thirty-seven counties penetrated by the Railway Company to be taxed a second time under the guise of intangibles outside of the counties in which they were situated where they had already been equalized and taxed and to be a second time

taxed on different levies from those of the counties in which they were.

It is the contention of the defendants in error herein that:

1. Under the Constitution of the State of Texas, Article 8, Section 1, "all property in this State whether owned by natural persons or corporations other than municipal shall be taxed in proportion to its value" and that under Section 2 of Article 8, the Legislature is prohibited from exempting any property from taxation except such as is specially authorized to be exempted under the Constitution.

2. That it was the purpose of the Intangible Tax Law to tax the entire properties of railroad corporations.

3. That while the said law suggests a method of arriving at the value of the intangible properties of railroad corporations, the Board is vested with discretion in fixing such values in any just and lawful manner.

4. The act of the Board in fixing the value of intangible assets is a quasi judicial act and its findings are conclusive as to values unless its acts are fraudulent.

In addition to the constitutional provisions set out above, Articles 7517, 7518, and 7520, Revised Statutes of 1911, require railway companies to list "all their real and personal property" in the counties where situated "at the full and true value"; Article 7517 requires this "listing" to be sworn to. Pursuant to these statutes petitioners listed, under oath, their physical properties (exclusive of rolling stock) in all the counties in which they operated at a total valuation of "about $14,000,000" as its "full and true value." (Record, p. 234.)

Article 7525 requires petitioners, under oath, to list their entire rolling stock at the "true and full value" thereof; pursuant to this statute the rolling stock was so listed as having a value of $2,168,906. (Record, p. 234.)

The above valuations were testified to by Mr. Holder, land and tax agent for petitioners. (Record, p. 234.) We have here, then, a sworn valuation of purely "tangible properties" by appel-

lants themselves (who necessarily, were in the best position of anybody to classify their entire properties as between "tangibles" and "intangibles"), aggregating $16,168,906. And of this valuation of "tangibles" the members of the State Tax Board knew.

Now, the petitioners were required by the statute each year to make a sworn report to the State Tax Board showing, among other things, *"the true value* of all the tangible property owned by such company in each of the counties of the State." These reports were made for each year since 1907, and the report for the year ending December 31, 1914, showed such value of the "tangible properties" to be the aggregate sum of $26,026,810.78 (Record, p. 492), exclusive of rolling stock, which was rendered at $2,168,906 (Record, p. 492)—a total valuation of "tangibles" of $28,195,716.78. The State Tax Board took the sum of $28,372,810 as the value of the tangibles (Record, p. 494), thus exceeding petitioners' valuation of this class of property by the sum of $204,904. This necessarily decreased the valuation of intangibles by a like amount. Petitioners filed another affidavit with the Board showing the value of their physical properties, including rolling stock, to be the sum of $28,000,000. (Record, p. 363.) Mr. Bagby, chairman of the Board, testified that the Board took these figures reported and sworn to by petitioners as the basis of the Board's finding of the value of the "physical properties." (Record, p. 363.) That these figures were reported, under oath, to the Board as the true value of the physical properties, is nowhere contradicted. The report itself is in the record at pages 184 to 185 of the record sworn to by Mr. W. J. Werner, auditor for petitioners.

This report also showed that the total value "assessed" in all the counties, exclusive of rolling stock, was the sum of $27,966,444. (Record, p. 185.) But this sum *included* the assessments on the valuation of intangibles as made for the year 1914. (Record, p. 233.) The valuation made by the Tax Board for 1914, and included in the sum just mentioned, was approximately $14,000,000. (Record, p. 234.) And this the Board knew. (Record,

p. 234.) The value of "rolling stock" assessed for all the counties, as shown by the report, was $2,346,992. (Record, p. 187.) So that the "assessed value" of all physicals for 1914 was approximately $16,000,000.

The only other factor to be considered by the Board was the "entire value of the property" of appellants. The minimum "entire value" for the property shown by the record is the sum of $32,471,027.05 (the valuation of the Railroad Commission of Texas), plus $1,542,065.02 additions and betterments made since said valuation by the Railroad Commission, or an aggregate minimum value of $34,013,092.07; this is alleged in the petition of petitioners, as shown by the opinion filed in this case, and there is not a scintilla of evidence in the record to show that the value of the "entire property" is less than these figures.

The par value of all lien indebtedness of petitioners and the Railway Company, as shown in the petition, and in the opinion of the Court of Civil Appeals, was $27,332,000; this included Receivers' certificates to the amount of $600,000. (Record, p. 401.) The non-lien indebtedness (minus the $600,000 Receivers' certificates just mentioned) was $3,340,867. (Record, p. 191.) The total indebtedness was, therefore, $30,672,867. The indebtedness (secured and unsecured) deducted from the minimum value shown for the "entire properties" ($34,013,092.07) leaves $3,340,-225.07. This remainder certainly represents the minimum value of the stock.

The Railroad Commission includes in its final valuations 6 per cent of the physical values found as a "franchise value." (Record, p. 382.) The petitioners, before the Tax Board, expressly refused to admit the correctness of the valuations made by the Railroad Commission. (Record, p. 153.)

The State Tax Board found the "entire value" of all the properties of petitioners to be the sum of $39,116,033. (Record, p. 365.) Petitioners nowhere in their petition or in the evidence have denied that the total value of all their properties was less than this figure. Of course, they say that the intangible value

and the value of the stock is excessive, but no denial can be found of the proposition that their whole properties were worth less than the amount found by the State Tax Board. But there is ample evidence to show that their entire properties were worth at least $39,116,033. And as to this we call attention to the following facts,—shown in large by the records of petitioners,—and nowhere contradicted:

The actual money investment in "road and equipment" up to June 30, 1915, was the sum of $46,502,041.55. (Record, p. 283.) Of course, some elements of the property in which this investment was made from time to time were subject to depreciation; but other elements were at the same time subject to appreciation,—for instance, the value enhancement of the Magnolia Park and other property is estimated by Mr. Freeman for the I. & G. N. at at least $1,000,000. (Record, p. 284.) These elements of "appreciation" are not set up in the books of the petitioners, but all "depreciation" is so taken account of, and, after allowing for "depreciation" the balance sheet of petitioners states the value of "road and equipment" to be $37,243,133.44 as of June 30, 1914. (Record, op. p. 282.) These figures are not only carried on the books of the company, but they were reported under oath to the Railroad Commission of Texas and to the Interstate Commerce Commission. Petitioners have not challenged the correctness of the figures. If the total lien and non-lien indebtedness be subtracted from this amount it leaves $6,570,266.44. If the figure (28,372,810 dollars) used by the Board as the value of the tangible properties be deducted from this sworn statement of value by petitioners, it leaves $8,870,323.44.

Mr. T. J. Freeman, who has been connected with these properties for a great many years, expresses the opinion that they are worth in excess of $40,000,000, and gives good reasons for his opinion. A good many elements of property considered by Mr. Freeman are clearly "going concern values," and in practically every important particular he is corroborated by petitioners themselves.

For instance, Mr. Freeman estimates the value of the trackage right, etc., arrangement with the G., H. & H. as worth at least $1,000,000. Petitioners stated that it "is material to the interests" of the I. & G. N. "that the terms and provisions of these contracts be kept and maintained" and that "it would be disastrous to the property to have these contracts annulled." (Record, p. 284.) Mr. Freeman estimated the value of the "seasoning" of the I. & G. N. at the minimum sum of $1,000,000. That such a value exists is admitted by Mr. Fay, general manager for petitioners, and a witness for them in this case. (Record, p. 231.) Mr. Freeman estimates that the Magnolia Park (a part of the Houston terminals of the I. & G. N.) is worth at least $1,000,000 more than the amount paid for it and accounted for in the $37,243,133.44 mentioned above. That these and other terminals have a value as a part of a going concern, and a value which cannot be localized, was admitted by Mr. Fay in this case (Record, p. 231) and by Mr. Booth, traffic manager, admitted the same thing in effect. (Record, p. 217.) Mr. Booth also testified that the I. & G. N. "has valuable franchises" in the city of Houston "worth a great deal from a traffic standpoint" which "added something to the value of the properties as a whole." (Record, p. 217.)

Mr. Fay testified that "as to express, the railroad incurs no expense outside of the equipment, the handling is done by the express companies." (Record, p. 231.) The same, manifestly, is true as to the "mail"; the petitioners received $245,373.74 from mail service and $181,999.98 from express service for the year ending June 30, 1915, and similar amounts for each year. (Record, p. 289.)

That the *stock* of the I. & G. N. Ry. Co. has a value of $5,078,000 in excess of par according to the judgment of its owners is conclusively established in this case. This additional value is represented by an interim certificate for that amount issued by the I. & G. N. Ry. Co. to the International & Great Northern Corporation, which corporation is also the principal stockholder of the I. & G. N.

The reason for the issuance of this certificate is briefly this: When the properties of the *old* I. & G. N. Ry. Co. were sold out in 1911, the purchasers thought that they were worth in excess of $36,000,000, and provided for the chartering of the *present* I. & G. N. Ry. Co. with an *authorized* capital stock of $11,500,000. (Record, p. 190.) When it was found that the Railroad Commission would not authorize the issuance of all the stock and bonds contemplated, stock was actually issued to the amount of $4,822,000, and the interim certificate was issued for the par value of $5,078,000 to cover excess of value over the Commission's valuation, and to be taken up in regular stock when the same might be lawfully issued. This item of $5,078,000 is carried as a liability upon the books of the Railway Company. (Record, p. 212.) It is found in the "comparative general balance sheet" on page — of the record as "other deferred credit items." As to it, W. J. Werner, auditor for the company, testified as follows:

> "The witness stated that the interim certificates appeared in the statement in the deferred credit items; that is, in the statement of the figures introduced. This means a liability. The face amount of the interim certificates was $5,078,000. The item appears somewhat larger as containing other elements. Interim certificates are carried as stock is carried, and, if added to preferred and common stock, would make the sum of $9,900,000. The authorized capital stock under the charter is $11,000,000, and under the plans of the company common stock is reserved to be exchanged for the interim certificates, as the Railroad Commission may increase its valuation to that extent. The $1,600,000 of bonds referred to above is exchangeable for preferred stock, and if added to the interim certificates and other stock, would make the amount of $11,000,000, but the company has not been capitalized up to that amount, according to the witness' books." (Record, pp. 212-213.)

With respect to the reasons for the issuance of the certificate and the value behind it, the International & Great Northern Corporation stated:

"The outstanding capital stock would be $5,000,000 of preferred stock, and $6,500,000 of common stock, making a total of $35,139,000 of capitalization upon a property which then had actual indebtedness prior to the sale in excess of $36,000,000, and had demonstrated by its earnings, operation by the Receiver, a value in excess of that amount." (Record, p. 297.)

"On the question, as to the consideration moving to the company, we submit that the record in this case fully discloses an adequate consideration within the meaning of the law as defined and construed by the Texas courts." (Record, p. 203.)

"Without going further into an analysis of these features of the reorganization plan, which are set forth at length in the record herein, it is respectfully submitted that in consideration given by the reorganization committee to the new company, for its securities, including the proposed issue of $6,500,000 of common stock, a part of which is now represented by the conditional interim certificates, was not only a valuable and adequate consideration for all the securities, including the conditional interim certificates, but exceeded in actual present value the par value of such securities." (Record, p. 304.)

In other words, if the company could have issued all of its common stock at the time, it would have been supported by an abundant and valuable consideration as between the stockholders and the company, to meet the provisions of the Texas law, as construed by the highest courts of that State.

"That even if we consider the question of consideration as being now before us, yet the consideration given to the company by the reorganization committee under the plan of reorganization was adequate and abundant as between the company and its stockholders to sustain the issue of the entire $6,500,000 of stock provided by the articles of incorporation in accordance with the laws of Texas, as construed by its highest courts.

"That the company having received from the reorganization committee this consideration, having a present actual value in property and cash adequate to sustain the issue of all the common stock authorized by its articles of incorpora-

tion, including that represented by the conditional interim certificates." (Record, p. 305.)

It is clear that in view of the constitutional and statutory provisions above set out that it was the intention of the Board to arrive at the true value of the property of the Railway Company. The State Tax Board is constituted by Chapter 4 of Title 126, Revised Statutes of 1911, and under Articles 7410 to 7412, inclusive, it is made its duty to make a thorough investigation and they are given the power to administer oath and summon witnesses, etc., and under Article 7516 to 7418, inclusive, the railroad companies are required to make preliminary annual statements to the Board and the Board may take any additional evidence they see fit and are then required to make a preliminary estimate and if the railroad companies desire to protest, set the case down for hearing. (R. S., 7419.)

Articles 7420 and 7422, the articles which are drawn in question, read as follows:

"Art. 7420. Same.—In so far as the other evidence and information adduced before said State Tax Board does not make it appear to the members of said Board to be improper or unjust to do so, said Board shall, in fixing the true value of the entire property of such individual, company, corporation or association embraced within the provisions of this chapter, take as a basis therefor the aggregate market or true value of all its shares of stock, adding thereto the aggregate market or true value of all indebtedness secured by any mortgage, lien or other charge upon its property or assets, and the sum so produced shall be deemed and treated as the true value of said entire property. And where the individual, company, corporation or association does business and has property, both within this State and outside of it, in ascertaining the true value of its property within this State, said Tax Board shall next ascertain from said statements, reports and evidence, if any or otherwise, the true value, in the locality where the same is located, of each such several pieces of real estate situated outside of this State, and of its other properties, if any, outside thereof, and not specifically used in the business of said individual, company, corporation or association, and the

aggregate of said value shall be deducted from the gross value of the property as above ascertained; and the result of said deduction and the sum or value thereby obtained shall be deemed and treated as the true value of all property of such individual, company, corporation or association in actual use in its business. Said Tax Board shall then fix the true value of the property of such individual, company, corporation or association within this State, using as a basis and being guided so far as it shall not believe it unjust to do so, by the proportion which it finds to exist between the total lines or total receipts within this State and outside of it, and lines controlled or operated, or the receipts obtained, entirely within this State, so that there shall be apportioned to this State, as the true value of the property within its borders of each individual, company, corporation or association doing business within and outside of its limits, such proportion of the true value of all the property of such individual, company, corporation or association which is specifically used in its business, as is borne by its total lines or total receipts within this State when compared with the total lines or total receipts both inside and outside the State of Texas. From the entire value of the property within this State, when ascertained as directed by this chapter, said State Tax Board shall deduct *the true value of all the tangible property of such individual, company, corporation or association within this State,* as so ascertained by said State Tax Board, and the residue and remainder of value shall be by said State Tax Board fixed, determined and declared as the true value of the intangible properties owned and held by such individual, company, corporation or association within this State. Said State Tax Board shall apportion the sum of the said total taxable values within this State to the counties in which such individual, company, corporation or association does business, in proportion to the amount of business done in and receipts derived from each such county, except that, in the case of a railroad company, the apportionment to each county shall be in proportion to each to the line or lines of such individual, company, corporation or association therein. In apportioning the values of the aforesaid properties said State Tax Board shall have the right, and it shall be its duty, to make use of and consider all evidence which may be put before it, and all material facts at its command; and, if it shall believe that some method of

calculation other than that specifically prescribed in this chapter is necessary in order to produce just and lawful results said Board shall follow that method of calculation which it believes best calculated, under all circumstances, to bring about a just, fair, equitable and lawful valuation and apportionment of such property."

"Art. 7422. Board to certify amount of intangible assets to assessors.—Thereafter, and not later than the twentieth day of June of each year, said State Tax Board shall make, in accordance with the provisions and requirements of this chapter, a final valuation and apportionment of the intangible assets aforesaid, of each and every such individual, company, corporation and association, and shall, as soon after such twentieth day of June as practicable, certify to the tax assessor of each county in this State to which any portion of such intangible assets of any such individual, company, corporation or association is found by said Board to be apportionable for taxation and so apportioned, the amount thereof, as fixed, determined and declared by said Board and thereunto apportioned by said Board, together with the name and the place of residence or place of business of the owner or owners of the property embraced in such valuation and apportionment of such intangible assets, properly apportionable and apportioned by such said State Tax Board to any unorganized county shall be by said Board so certified to the tax collector of the county to which such unorganized county is attached for judicial purposes. It shall be the duty of the tax assessor of such county, upon receiving such certificate or certificates of said State Tax Board, to place, set down and list upon forms prescribed by the Comptroller of Public Accounts for such purpose, upon the tax rolls of his county, and of each unorganized county which is attached to his county for judicial purposes, as the case may be, any and all such intangible assets, at the value so fixed, determined, declared and certified by said State Tax Board. Such county tax assessor shall extend and prorate upon said rolls the State and county taxes upon all such intangible assets in the same manner as taxes upon other property are extended and prorated. Said assessment, valuation and apportionment of such intangible assets so fixed, determined, declared and certified by such State Tax Board shall not be subject to review, modification or change by the tax assessor of such county, nor by

the board of equalization of such county; and the State and county taxes thereon shall be collected by the tax collector of such county and accounted for by him in the same manner and under the same penalties as taxes upon other property. All State and county ad valorem taxes upon all intangible property in this State belonging to any individual, company, corporation or association embraced by this chapter shall be assessed under its provisions and not otherwise; but ad valorem taxes upon all other property of any and all such individuals, companies, corporations and associations shall be assessed as is now or as may hereafter be provided by law."

It was evidently the purpose of the Board as shown above to arrive at the true value of the entire property of the Railroad Company as a basis on which to fix the intangible values; that there was no fraud in the action of the Board in fixing the value is shown by the testimony of A. P. Bagby, tax collector, and whose testimony is uncontradicted. Mr. Bagby's testimony is in part as follows:

That he has lived in Texas all his life, and is now Tax Commissioner of the State, and has been since January of 1915, his predecessor being A. L. Love, and that his duties in a general way were to find the intangible assets of certain corporations and make reports to the Legislature on the tax laws of the State, and that the different railroads make reports to the State Tax Board, and that the Board gathered all the information it could from all sources, and at times examined the reports filed with the State Railroad Commission and other public records bearing on the subject, and read all the text books on the subject which they could get, but had not been able to listen to any discussions on the subject. That when he first went into the office he invited two of the railway attorneys of the State of Texas, and the different ex-Tax Commissioners of the State to discuss the subject with him, towit: Messrs. Garwood and Glass and Mr. Love, ex-Tax Commissioner, and also Mr. Davey. That he had acted in good faith, and tried to get all the information he could as to what the intangible assets of the railways were and had tried to study the statute. That in any mathematical calculation or for-

mula, the two main factors which he had endeavored to find in order to arrive at the value of intangibles, were the real value and the physical value of the railroads; that is, the real value of the entire property as a whole, and that he had done this in the case of the I. & G. N. Railway in connection with its valuation for 1915, and that the valuation found by the Board of $39,000,000 plus represented his best judgment as to the true value of the entire properties upon all the information which he had before him, and that the facts showed that that was the proper valuation in the judgment of the court, and that he was under no coercion from any source in making that valuation, and that it was hard to get anybody to discuss the intangible matters with him, and that the valuation of the property for the I. & G. N. for 1915 took into consideration the mathematical calculation used, and that disregarding the mathematical calculation and looking only to the result, that the valuation reflects the best judgment of which the witness was capable under all the information he had, and that he saw no conduct upon the part of any other members of the Board indicating that they were not exercising their best judgment, and so he would say the same as to every one of the railroads. That the representatives of the I. & G. N. Ry. had appeared before the Board on June 18, 1915, but that these representatives did not offer the Board any facts not disclosed by the records already before the Board. That their representations consisted partly of facts and partly of arguments, with perhaps three witnesses, the auditor, the tax man, and the head of the traffic department testified, but what they said did not change the opinion of the Board, and as far as he was concerned he went into the hearing with an open mind and gave a patient hearing or tried to.

The Supreme Court of Texas has construed this law as intending to tax the entire property of the corporation, of whatsoever character, in the case of M., K. & T. Ry. Co. vs. Shannon, 100 Texas, 379.

Judge Gaines, on page 390 of the opinion, discusses the case of the State vs. A. & N. W. Railroad Company, 94 Texas, 530,

and shows that it was held in that case that the intangible assets of a railroad company under the law then existing should be assessed by the county assessors of the respective counties, by adding to the value of the tangible property so listed the intangible values. He there says:

> "We recognized then that the methods of assessing the intangible values of a railroad company provided by the laws then in force was extremely crude and poorly calculated to accomplish the proposed object. In the present law the Legislature has attempted to correct this and to provide a mode by which the intangible values of the line or lines of the railroad company in operation may be assessed *as a part of the whole property* of the railroad company and apportioned to the respective counties through which such line or lines are located."

In the same connection he further says:

> "The intangible values of a railroad company are the values of the railroad property above the value of its physical assets, which intangible values ordinarily result from the profits of its business as actually conducted."

This is a positive construction of the Intangible Tax Law, as meaning to reach all the values of the whole railroad properties over the value of its physical properties and assets. It is true that the law construed by the Shannon case was the law as enacted in 1905, but there is no change by the amendment of 1907 in that part of the law which shows the property that is to be taxed and there is no change in the direction as to the method of arriving at the value of its property, except that by the law of 1905 it was the assessed value of the tangible property which was deducted from the value of the entire property, whereas, by the amendment in 1907 the true value of the tangible property is deducted. In neither law, however, is the method of calculation made mandatory. No reason is shown by the amendment of 1907 for the change in deducting the true value of the tangibles instead of the assessed value. It is noteworthy that what is known

as the full rendition law was passed in 1907, at the same session of the Legislature as the amendment to the Intangible Tax Law, and both of these laws were approved on the same day by the Governor.

General Laws of 1907, pages 462-469.

It is our construction both of the Intangible Tax Law of 1905 and of the Intangible Tax Law of 1907 that the purpose was to tax all property of every character owned by the corporations affected. It is doubtless true that the Legislature in amending the law in 1907 assumed that the tax assessors of the different counties and the boards of equalization of the different counties would perform their duties as enjoined upon them by the full rendition law, and would assess the tangible property of the various railroads at their true value and that it would therefore accomplish the purpose of the Intangible Tax Law to reach all the property of railroad corporations by deducting the true value of the tangibles from the value of the entire properties.

That the purpose of the Intangible Tax Law is to reach all properties of railroad corporations is shown by several Federal cases construing similar laws of different States.

Western Union Telegraph Company vs. Norman, 77 Fed., 13.

This case construed a Kentucky law levying an annual tax on the "franchise" of railroad and other corporations. It provided for a valuation of the franchise by a State board of valuation. In order to assist the board in determining the value of the franchise each corporation was required annually to file with the board a statement showing its gross receipts, the value of its properties, stocks, debts, etc.

The law directed that the board, in arriving at the value of such franchise should fix the value of the capital stock of the corporation and should deduct therefrom the value of its tangible property in the State. The contention was made that the purpose of this law was to levy against an instrument of interstate commerce a tax on its privilege or right to do business in the State, but the court construed the law as imposing a tax on the

intangible property of the corporation; that is a tax on all the property of the corporation of whatsoever kind, exclusive of the tangible property, saying:

> "As we construe the law the Legislature intended that the corporations, companies and associations named in the various sections should be treated as an entirety and taxable as such; and in using the words 'capital stock' it intended to include all of the property of these corporations, companies and associations and to have all the property valued as an entirety."

In the opinion the court gives the following definition of the words "intangible property":

> "Intangible property in the revenue law not only includes the value of franchise, but also *any other property* rights which the companies or the associations may own and which are taxable."

This case was appealed to the Supreme Court of the United States, but was "dismissed with costs, per stipulation."

17 Supreme Court Reporter, 1002; 41 L. Ed., 1182.

Pittsburg, etc., Railroad Company vs. Backus, 154 U. S., 421.

This last named case involved the law of the State of Indiana taxing railroad corporations. The law provided that all property within the jurisdiction of the State not expressly exempted should be subject to tax. It expressly declared that the property of the railroad corporations was divided into two classes, "railroad track" and "rolling stock." The law further provided for the filing with the State Auditor of a statement very similar to the statement required to be filed under our law, and the board was directed to assess the railroad property denominated in the act as "railroad track" and "rolling stock" at its true cash value. In discussing the purpose and scope of the law and the property intended to be taxed by it the court said:

> "Counsel sought in argument to narrow the meaning of the words 'railroad track' and 'rolling stock' as though the two did not include the entire railroad property; but evidently the Supreme Court of the State construed, and as we

think, properly, the two terms as embracing all which goes to make up what is strictly railroad property. By Section 3 of the act, it is provided that all property in the State shall be subject to taxation unless expressly exempted. By Section 4, that when the property of a corporation is taxed to the corporation the shares held by individuals shall not be subject to taxation. There is in terms no exemption of any railroad property, or any part thereof; and there is no provision of the tax law reaching that which is strictly railroad property, except as embraced within the two terms, 'railroad track' and 'rolling stock.' Obviously, it was assumed by that court, though the matter is not discussed in the opinion, that by these two descriptive terms the Legislature, carrying out the declared purpose of subjecting *all property* within the State to taxation, not expressly exempted, *meant to include all the property owned or used by the railroad companies in the operation of their roads, and which may fairly be called 'railroad property.'* And when the statute provides that such property shall be assessed at its 'true cash value,' it means to require that it shall be assessed *at the value which it has, as used, and by reason of its use.*"

154 United States Reports, pages 429 and 430.

It thus appears that in order to accomplish the purpose of the law and the mandate that all property shall be taxed, the Supreme Court of the United States construed the words "railroad track" and "rolling stock," used in the Indiana law, to include all property owned by the railroad company of whatsoever character. These words are not nearly so broad as the words "intangible assets and properties," used in our Texas law, and the same mandate that all property shall be taxed appears in our Constitution.

State Railroad Tax Cases, 92 U. S., page 575.

The law involved is a law of the State of Illinois, which levied a tax on "the capital stock, including the franchise, over and above the assessed value of tangible property." This law also provided for a statement of the receipts, stocks, bonds, mileage, etc., of the railroad company to be filed with the Board, as required by our law. The Board adopted a method of ascertaining the value of

the capital stock, including the franchise, which method provided for the finding of the market or fair value of the capital stock and the market or fair value of the debts of the corporation and the deduction from the total of these items of the assessed value of the tangible property. In discussing the purpose of the law Justice Miller said:

> "The theory of the system is manifestly to treat the railroad track, its rolling stock, its franchise and its capital as a unit for taxation, and to distribute the assessed value of this unit according as the length of the road in each county, city and town bears to the whole length of the road."

He refers to the capital stock and franchise as an element of property for taxation and describes it as "the value of the right to use this tangible property in a special manner for the purpose of gain."

He discusses the rule adopted by the Board for valuing the property and says that while it may not be the wisest mode of doing complete justice in the difficult matter "we confess we have on the whole seen no scheme which is better adapted to effect the purpose, so far as railroad corporations are concerned of *taxing at once all their property.*" This is a direct and positive construction of the law taxing the "capital stock and franchise" of a corporation as a law intended to tax at once all the property of the corporation.

A determination of the question at issue involves a question of the taxing power of the State and the plan or scheme devised by the Legislature for the due exercise of this power.

Section 1 of Article 8 of the Constitution of Texas, among other things, declares:

> "All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law."

Patently, this constitutional mandate required that every ele-

ment of property by whatever name known, whether it be called "tangible" or "intangible," or mixed "physical" or "metaphysical," must bear its due proportion of its burden of the government. If, when the requests of the labors of all the taxing officers of the State are added together and by complaint assessments made under the scheme devised by the Legislature therefor, a result is reached whereby all the property of any individual or corporation is subjected to taxation by whatever name the property may be known, this result can furnish no basis of complaint because constitutional command quoted was the declared will of the sovereign in the exercise of the most fundamental of its powers generations before complainants were born and years before the property which they now own came into their possession. Has this result been reached? The determination of this discussion required a brief question of the plan adopted by the Legislature for the ascertainment of the value of the property of corporations of the class to which complainants' company brings.

Bearing in mind always that it was under the constitutional duty to require all property of whatever description to be assessed, the Legislature has from time to time enacted a general scheme complete in itself, and well calculated to reach this result, and it is improper in the question of the result to question a loan.

One element of railroad property consists of steel in the rails and the wood in the ties, the iron in the spikes that holds the rails to the ties, the ballast in the roadbed, the land in the right-of-way, the material in the structure of the trestle, the iron and wood and other material in the cars and locomotives constituting the rolling stock, the land, the material and the buildings of stational and terminal facilities, shops and tools.

This element of value is supposed to be reached by the provisions of Chapters 11 and 12, Title 126, Revised Statutes, 1911. As the basis of the assessment of this element of railway property, the company is required to deliver a sworn statement to the assessor of each county in which a part of its road is located,

a sworn statement showing "paragraphs 1, 2 and 3 of Article 7554, Revised Statutes, 1911." Now for the purposes of this assessment, the county assessing officers are required to value the property as it appears on the ground and of itself, but faithful as may be public officials, and honest as may be those making valuations, it must happen when human nature and force of motives are considered, that elements of this property will escape taxation because of undervalues or omission from assessment. Furthermore, this purely "physical" property has a value apart from and in addition to the value placed upon it by the county officials, and in addition to its value when considered by facts, "the sleepers and rails of a railroad, or the posts or irons of a telegraph company, are worth more than the prepared wood and the bars of steel or coil of wire from their organic connections with other rails or wires and the rest of the apparatus of a working whole." Fargo vs. Harpe, 193 U. S., 490. It has a value as a part of a going concern, it has a value because it is operated under and by reason of a valuable franchise entitling the owners of the property to collect tolls and charges for its use from the public, and because of the excess of the property tax and in the operation of it, the owners in fact, exercise a portion of sovereignty. The railroad being a public highway and the right to collect charges for the use as a public highway belonging in the first and last analysis, to the sovereign.

As it is true of the truly physical property, it is also true of this franchise value when considered by itself, that it has an element of value in addition to its value per se, this additional value comes about from the fact that it is a part and an element of a going concern, pursuing a profitable occupation and altogether constituting an enterprise involving elements of sovereignty.

It came about, therefore, that in order for the constitutional mandate to be carried forward it was necessary to devise some plan whereby all the elements of all the different species of this property might be subjected to taxation in addition to taxation

upon the assessment of each of the elements mentioned when considered alone.

It was the purpose of the Legislature, therefore, in the enactment of the "intangible" tax law subject to taxation of elements of property by whatever name called and whether defiant or not and which under the other plans of assessment were not reached. All these escaping elements of taxable property under the other scheme are sought to be subjected to taxation under the general name of "intangibles" by the purposes and provisions of the statute. After a going concern be granted any given entire value as to property, no man can tell exactly where the value of purely "physical" stops and the value of "intangibles" begins. It also being true that the valuation of the purely "physicals" being left to a large number of boards and individuals and being based in the beginning upon estimates of value fixed by corporations themselves, who are to be subjected to the burden of paying the tax, some elements of the purely "physical" values of the property must escape; and it is the purpose of this act, among others, to subject these escaping elements to taxation.

Now bearing in mind the purposes in view, and the difficulties to be encountered in the construction and administration of an equitable tax system, the Legislature in this act vouchsafed to the Tax Board wide discrimination, and charged the Board with the duty of exercising this discrimination for the purpose of carrying out and achieving the broad result in mind.

In order that no element of property might escape, the Legislature suggested a plan of calculation to be followed by the Tax Board,—"in so far as the other evidence and information adduced before, said State Tax Board does not make it appear to the members of said Board to be improper or unjust to do so,"—and that plan is the following:

The Board must find the *true value* of the *entire property* (and it will be noted in this connection that the Board is not required to take the value fixed upon any element of the entire property by any other individual or board). Now as the basis of this

true value of the entire property, it is suggested that the Board shall first add together the *true value* "of all shares of stock" and the aggregate market of *true value* of all lien indebtedness.

Now from the *true value* of the entire property as found above, the Board shall deduct the *true value* of all the "tangible" property, it will be noted here also that the Board is not required to take the estimate of any other individual or board as to this value, but the Board is expressly authorized "if it shall believe that some method of calculation other than that" suggested is necessary in order to produce just and lawful results, to set that method aside and to "follow the method of calculation which it believes best calculated under all circumstances to bring about a just, fair, equitable and lawful valuation and a portion of such property." It will be noted here that the terms "such property" refers back not only to the general term "intangible" but to the terms "true value of the entire property" and "the true value of all the 'tangible' property,"—emphasizing the purpose of the Legislature to conclude under the general term "tangible" every element of the corporation property that had not been subjected to taxation by the county officials.

It becomes apparent, therefore, that if, when the total assessed valuation of "purely physical" by the various counties is added to the assessment of valuation under the general term "intangible" the result does not exceed the real value of all the railroad property of the company irrespective of its division and the elements regardless of terminology, due process has not been lacking, but on the other hand the constitutional command that all property shall be assessed in proportion to its value, has been obeyed.

The Board in its calculations and under the methods chosen by it, found the entire value of the railroad's property to be $39,116,033. This was a finding of fact, to the effect that the company possessed that much property in the State, subject to taxation, and which, of course, ought to be taxed; under the method pursued by it, it found that only $28,375,810 of value of this

property had been subjected to taxation by the action of various county officials. Now if it be true that the "whole property" is in fact worth $39,116,033 and only $28,372,810 worth thereof has been subjected to taxation, if "physicals," then the plan reached of Section 1, Article 8, of the Constitution of the State requires, $10,743,223 more of value be placed upon the tax rolls. The county officials having acted, there remains no other way to get this escaping property upon the roll, except by the action of the State Tax Board. The purpose of the statute, and its effect, if faithfully administered, is, therefore, to cause to be assessed all the property that is not otherwise subjected to taxation; any method adopted by the Board that will produce this result cannot operate to confiscate property or take it without due process of law because manifestly this is the result plainly commanded by the Constitution.

The justice and wisdom of this purpose and effect, in the statute, is illustrated somewhat by the bill itself. In paragraph 27 it is alleged that the Railroad Commission has valued the Railway Company's "physicals" at $32,471,027.05, and that it has at least an additional value of the "physicals" of $1,542,062.02, or a total "physical" value of $34,013,092.07, but this same "physical" value is assessed by all the counties at only $28,372,810, leaving only $5,640,282.07 of property wholly untaxed and which would remain untaxed unless covered by the general term "intangibles"; this $5,640,282.07 owes tribute to the State just as much as any other equal amount of property in the State,—and it must be immaterial to the Railway Company whether it is taxed under the term "physical" or "metaphysical" because it is plain that it must be taxed in order for the plain command of Section 1, Article 8, to be obeyed. The necessity of this construction of the purpose of the statute may be illustrated by other facts and conditions set up in the answer.

The "Book Cost" of the properties of the Railway Company,—according to the evidence submitted by the company and the Receivers to the Railroad Commission,—for the purpose of securing higher rates, amounts to the sum of $43,818,430.79. This may

not be, and, of course, is not, a conclusive test of the value of the property as a whole, but is one criteria worthy of consideration. Accordingly, the Tax Board's assessment, plus the combined assessments of the various county officials, allows $4,701,397.79 worth of property to escape,—or about 10 per cent of the whole. For taxation purposes, therefore, the State, through its various taxing officials, has undervalued the property in favor of the complainants, instead of overvaluing. See Werner's Exhibit 8.

While the law directs a method of arriving at a value of the intangible properties it invests the Board with discretion in fixing such value in any just way. Its findings as to such value are conclusive unless the acts of the Board are fraudulent and the findings cannot be overthrown by evidence that the value was otherwise than as found by the Board.

The language of the law clearly leaves the question of value to the discretion of the Board. The first portion of Section 14 of the law provides a method of calculation which the Board may take as a basis. The Board is merely directed by this section to use such basis in the event other evidence or information adduced before the Board does not make it appear to the members of the Board that it will be improper or unjust to use such basis. The last paragraph of Section 14 of the law provides that it shall be the duty of the Board "to make use of and consider all evidence which may be put before it and all material facts at its command, and if it shall believe that some method of calculation other than that specifically prescribed in this act is necessary in order to produce just and lawful results said Board shall follow that method of calculation which it believes best calculated under all the circumstances to bring about a just, fair, equitable and lawful valuation and apportionment of such property."

No language could be used more clearly showing a purpose to leave to the discretion of the Board the method of calculating the value of the intangible assets.

It is obvious from the nature of the property sought to

be reached by the law that no arbitrary method of calculation could be prescribed, but that such matter must necessarily be left to the discretion of the officers upon whom the duty is imposed. The very word "intangible" shows that the value of the property is difficult to measure. It is clear also that the privilege or right to enjoy the occupation is a valuable property right and incapable of exact valuation. The value of the properties as the part of an entire system and as a going concern, its leases, terminal facilities and valuable contracts must be considered and all of these are difficult to value.

The authorities sustain the foregoing proposition.

State Railroad Tax Cases, 92 U. S., 575.

As above explained, this case involved a law which by its language levied a tax on "the capital stock, including the franchise, over and above the assessed value of the tangible property." This law, as has been shown, was construed to tax all the properties of the corporation. The Board adopted a plan of arriving at such value similar to the basis prescribed by the Texas law. One of the railroad corporations in that case was insolvent and in the hands of a receiver. It was unable to pay any interest on its bonds and its capital stock was of no value. This condition of the railroad is stated as a fact by the court, on page 606 of 92 U. S. It was contended by the railroad corporation that its entire franchises and property were not worth more than $1,088,749, and that its net earnings had never been sufficient to pay the interest on its debt. (See page 590.) Nevertheless, the capital stock and franchise of the corporation, exclusive of its tangible property, was valued by the Board at $2,003,415. It was contended in that case, and also in this case, that the action of the Board in thus valuing the property was contrary to the Fourteenth Amendment of the Federal Constitution, since the capital stock was of no value, the company being insolvent, etc. In response to such contention the Supreme Court said:

> "This sounds plausible; but it is nothing more. Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at

present no market value, or is unsalable,—there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value,—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling stock, and other tangible property? Is it supposed by anyone that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. *By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose.*

"It is this *franchise* which the Legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debt, who shall say that it is not worth $2,000,000? and who shall say that such is not the real value now of this franchise?"

The complaint was made in the bill that the Board acted improperly in arriving at the value of the property to be taxed, in that without notice to the complainant it increased a number of the estimates of value reported to it by the railroad company un-

der the statute. In answer to this contention the Supreme Court said:

> "As we do not know on what evidence the Board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the circuit court, should be better, or should be substituted for that of the Board, whose opinion the law has declared to be the one to govern in the matter."

As further showing that the matter of valuation should be left to the Board and not interfered with by the court we find the following in the opinion:

> "As we have seen no evidence that the rule by which railroad property is taxed is not uniform in its action on all the railroad companies of Illinois, we can perceive no opposition to the Constitution of the State in that rule.
>
> "But suppose it were otherwise; perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised, must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence on which human judgment is founded. Tappan vs. Merchants' National Bank, 19 Wall., 504; Weber vs. Renhard, 73 Penn. St., 373; Commonwealth vs. Savings Bank, 5 Allen, 247; Allen vs. Drew, 44 Vt., 174."

To the same effect the court further said:

> "It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irreg-

ularity, of themselves, give the right of an injunction in a court of equity. Mooers vs. Smedley, 6 Johns, Ch. 27; Dodd vs. Hartford, 26 Conn., 239; Green vs. Munford, 5 R. I., 478; Messert vs. Supervisors of Columbia, 50 Barb., 190; Dow vs. Chicago, 11 Wall., 108; Hannewinkle vs. Georgetown, 15 Wall., 548."

As showing that the action of the Board ought not to be disturbed except in a very clear case and that the courts should be slow to interfere with the collection of State taxes the following appears in the opinion:

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. * * * These reasons, and the weight of authority by which they are supported, must always incline the court to require a clear case for equitable relief before it will sustain an injunction against the collection of a tax, which is part of the revenue of a State."

Ohio Tax Cases, 232 U. S., 576.

The law construed by these cases is the Ohio tax on the gross receipts of railroad corporations, being called a franchise tax. In this case as to one of the railroads the facts showed that the earnings were insufficient to pay interest on investments and that the earnings were not even sufficient to pay operating expenses, and for this reason it was contended that the franchise was of no value

and that no tax should be paid on it, just as it is in this case contended that the I. & G. N. Railway Company has no intangible assets, for the reason that it is in the hands of receivers, and its stock is in process of elimination. The answer of the Supreme Court to this contention, speaking through Justice Pitney, is as follows:

> "Upon this point we are content to refer to, without repeating, the language employed by Mr. Justice Miller, speaking for this court in the State Railroad Tax Case, 92 U. S., 575-606."

Pittsburg, Etc., Railroad Co. vs. Backus, 154 U. S., 421.

As has been shown, the law involved in this case levied a tax on all the property of railroad corporations, though defining it as "railroad track" and "rolling stock." The valuation fixed by the Board on the property for the year 1891, being the valuation sought to be enjoined, was $22,666,470 as against a valuation of $8,538,053, for the year 1890.

As showing the difficulty of measuring the value of railroad properties the court quoted with approval from a Tennessee case as follows:

> "The value of the roadway at any given time is not the original cost, nor, a fortiori, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

The substance of the testimony attacking the valuation as fixed by the Board is as follows:

"The bill of exceptions discloses these proceedings on the hearing: The plaintiff offered the record of the action of the State Board for the year 1890, showing an assessment, as heretofore stated, so much less than that of 1891, which record was rejected as irrelevant and immaterial. Thereupon the plaintiff offered the record of the proceedings of the Board in 1891, which was admitted. This recited the appearance of the plaintiff by its officers, and that they were heard as to the proper valuation. It also contained a table by counties of the assessment as made by the Board, closing with this certificate:

"Making liberal allowances for all proper deductions, the State Board of Tax Commissioners has fixed the *values of the respective railroads* and parts of roads within the State of Indiana for taxation on the first day of April, 1891, as hereinbefore set forth.

"In arriving at the basis for the estimate of said values the Board has considered the cost of the construction and equipment of said roads, the market value of the stocks and bonds, and the gross and net earnings of each of said roads, and all other matters appertaining thereto that would assist the board in arriving at a true cash value of the same.

"The return made by the plaintiffs to the Auditor of State for the year 1891, in accordance with the requirements of the statute, was also given in evidence, which return was upon a blank furnished by the Auditor, and shows an aggregate valuation of about $8,000,000. This return was sworn to by the general manager and secretary of the company. The second vice president and general counsel of the plaintiff was called as a witness, and, after testifying to his familiarity with the property, and its value, was asked the value in 1890, but, on objection, this testimony was ruled out. He was permitted, however, to give testimony as to the value in 1891, and his answer fixed that value in the aggregate at $8,538,053, the same value that was placed upon the property by the State board in 1890. He was asked to state the average cash value per mile of the company's property in Indiana, and in

the other States into which the company's road extended, treating the portion in each State as constituting a unit, separate and distinct from those of the portions in the other States, but an objection to this was sustained, and the testimony offered ruled out. He then testified as to the terminal facilities in the cities of Chicago and Pittsburgh belonging to the plaintiff, and their great value, and the absence of terminal facilities of any particular value in any of the cities in Indiana. He was then asked if the plaintiff owned any rolling stock which was used exclusively in any one of the five States in which it did business, but this question was ruled out. In response to further questions he testified that the plaintiff had no rolling stock used exclusively within the State of Indiana for special purposes. Certain questions were also asked as to the notice or knowledge which the plaintiff had of the determination made by the State board in 1891 as to the valuation, but we have heretofore held that it is immaterial whether it had any notice thereof after the decision and prior to the adjournment of the board. The assistant engineer of the plaintiff was also called as a witness, and producing a written statement which he had presented to the State board prior to its determination, which statement goes at length into the mileage in the different States, the gross earnings, per cent of earnings, and the value of the track, testified that the facts in such written statement were true. Another witness, the assistant comptroller of the plaintiff, was asked what per cent of the gross receipts of its Indiana business was derived from commerce, beginning and ending wholly within the State and what from interstate business; but, on objection this testimony was ruled out. The Secretary of State, who was a member of the State board, was also called, and testified that the members of the board did not make an official examination or inspection of the railroad track and rolling stock of the plaintiff, being personally acquainted therewith; that they did not summon before them, or examine under oath, any person or persons acquainted with the true cash value of the property. The plaintiff also offered the return made by the Terre Haute and Indianapolis Railroad Company to the auditor of State for the year 1891, prepared upon the same form as that upon which the plaintiff's

return was made, but it was ruled out as irrelevant and immaterial, as well as the action taken by the State board in respect to the valuation of the property of such road. This was, in substance, all the testimony offered by the plaintiff.

"The defendant simply called the Secretary of State, who testified that in assessing the plaintiff's property no assessment was made, except upon the railroad track and rolling stock of plaintiff within the State, and no assessment was made of any property of value outside the State."

It thus appears that no evidence whatever was introduced to sustain the finding of the Board, except the testimony of the Secretary of State to the effect that the property assessed was the railroad track and rolling stock of the corporation within the State. The railroad company introduced positive testimony to the effect that the property was worth about $8,000,000. In view of this evidence the Supreme Court concluded that the valuation of the Board could not be disturbed, saying:

"Upon this testimony the decision of the court was that there was nothing to impeach the assessment made by the State board, and in this conclusion we concur. The true cash value of the plaintiff's property in the State of Indiana in the year 1891 was a question of fact, the determination of which for the purposes of taxation was given to this special tribunal, the State board. *Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a more presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.* Here the question determined by the State board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board. *It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish frauduient conduct on the part of the board sufficient to vitiate its determination.* It is not, however, contended by counsel that there was any actual fraud on the

part of that board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact bore, and did so with the purpose of making the plaintiff bear a larger share of the burden of the support of the State government than it rightfully should. The contention is rather that the board made a grievous mistake in placing so high a value, and that it took into consideration property outside of the State, and gave to the property within a value partly deduced from that without the State. The testimony, however, does not sustain this contention."

We call special attention to the fact that while the Supreme Court commented upon the remarkable and unreasonable increase in the valuation of the railroad to nearly three times its valuation for the preceding year it declined to disturb the action of the Board, for the reason that no fraud was either alleged or proved on the part of the Board in fixing the valuation.

Maish vs. Arizona, 164 U. S., 599-610.

In this case cattle were valued for taxation by the Tax Board of the territory at $7.42, whereas the testimony introduced showed that they were worth from $6.00 to $6.50 a head. This valuation was attacked as "grossly unfair and that there was a fraudulent discrimination in favor of the Southern Pacific Railway Company" in that the property of the railroad company was assessed at much less than its value. In answer to this attack the Supreme Court said:

"There is nothing tending to show that the board, in fixing the value of cattle at $7.42, acted fraudulently or with any wrongful intent, or that that valuation was not the result of its deliberate judgment upon sufficient consideration and abundant evidence, and it would be strange, indeed, if an assessment could be set aside because a single witness is found whose testimony is that the valuation was excessive. No assessment could be sustained if it depended upon the fact that all parties thought the valuation placed by the assessing board was correct. Something more than an error

of judgment must be shown, *something indicating fraud or misconduct.* Neither is the fact that an officer of the railroad company came before the board and declared its willingness to pay taxes on a certain valuation and its intention to resist the payment of taxes on any higher valuation sufficient to impute fraudulent conduct to the board, although it finally fixed the valuation at the sum named by the railroad company. It appears from the testimony of one of the members of the equalization board that it was guided largely by the valuation placed in other States and Territories upon railroad property, and that from such valuation, as well as from that given by the railroad company, it made the assessment at something like the average of the valuation of railroads in the various States and Territories named. It is unnecessary to determine whether this board erred in its judgment as to the value of this property, whether it would not have been better to have made further examination and taken testimony as to the cost of construction, present condition, etc. *Matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its judgment cannot be overthrown.* Pittsburgh, Cincinnati, etc., Railway vs. Backus, 154 U. S., 421-435."

Willoughby vs. Chicago, 235 U. S., 45.

A portion of the complainant's property was taken for public improvement and an assessment was made against his other property for benefit conferred by the improvement, this assessment being greater than the damages accrued him for the property taken. The complaint was that this amounted to a taking of property without due process of law, in that he had been deprived of property without being paid for it. The Supreme Court thus disposed of this complaint:

"It is objected that less was allowed for the land taken than was charged for the benefit, but it is quite possible that the benefit was greater than the loss and we cannot inquire into the fact."

Hibben vs. Smith, 191 U. S., 310.

This case also involved an assessment for public improvement. The court held that the amount of the benefit resulting from the improvement was a question of fact, that the decision of the board fixing this amount was final and that no Federal question arose.

Adams Express Co. vs. Ohio, 165 U. S., 114-229.

In this case a tax was levied by the State of Ohio on all the property of express companies and other corporations in the State, report was required of the total gross receipts within and without the State and the length of the line within and without the State. The Supreme Court following the case of Pittsburgh, etc., Railway Company vs. Backus, 154 U. S., 434, held that the whole property of the express company, both within and without the State, might be valued for taxation as a unit and the proper proportion of its property taxed by the State, even though by such tax interstate commerce was incidentally affected. The contention was made in the case that the valuation made by the board was excessive. In answer to this contention the Supreme Court said:

> "We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that 'whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.' Pittsburgh, Cincinnati, etc., Railway vs. Backus, 154 U. S., 434; Western Union Telegraph Co. vs. Taggart, 163 U. S., 1."

Kelly vs. Pittsburg, 104 U. S., 78.

In this case the assessment of the property was attacked because "enormously beyond its value." The Federal question was that this amounted to a violation of the due process clause of

the Constitution. The court held that this was a question of fact into which it could not inquire, saying:

> "The distinct ground on which this provision of the Constitution of the United States is invoked is, that as the land in question is, and allways has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. *Whether this be true or not we cannot here inquire.* We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject, that it is only necessary to refer to those decisions without a restatement of the argument on which they rest. State Railroad Tax Cases, 92 U. S., 575; Kennard vs. Louisiana, id., 480; Davidson vs. New Orleans, 96 id., 97; Kirtland vs. Hotchkiss, 100 id., 491; Missouri vs. Lewis, 101 id., 22; National Bank vs. Kimball, 103 id., 732."

Davidson vs. New Orleans, 96 U. S., 97.

This case contains a very interesting discussion by Justice Miller of the due process clause of the Federal Constitution, among other things, he says:

> "There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." * * * "As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us: That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State

or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." * * * *"It is also said that part of the property of plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so."* * *

This language clearly indicates that under the due process clause the Federal courts cannot inquire into the value of the property assessed or into the details of the assessment.

In the case of Southern Railway Company vs. Watts, 67 L. Ed., 199, a similar question was considered by the Supreme Court of the United States, Justice Brandeis delivering the opinion of the court. This was a case in which various railroad companies brought a suit in the Federal District Court of North Carolina seeking to enjoin the taxing officials from collecting the ad valorem taxes for the year 1921, imposed for local purposes and the franchise tax imposed for State purposes. The property taxes were assailed on the ground that as assessed they violated the equal protection clause, the due process clause and the commerce clause of the Federal Constitution and the uniformity clause of the State Constitution. Under the Constitution of the State of North Carolina taxation of real and personal property must be uniform and ad valorem according to its true value in money. In all of the assessments made prior to 1920 nearly all classes of property had been grossly undervalued, the undervaluation varying greatly in degree. Under the Acts of 1919 provision was made for new and fundamentally changed valuations of all property at full values, the valuation of real estate to be made by county officials and that of railroad property by a State board, the taxes later to be allocated to the counties on a mileage basis, the assessments to become effective only when approved by the

Legislature. Revaluations were made under this act and the assessments of railroad property on the average doubled as compared with previous assessments and real estate quadrupled. By an act of the Legislature of 1921 provision was made for the revaluation of real estate by the county boards and railroad property by the State boards. Proceeding under that act reductions were made in sixty-seven counties varying from one to fifty per cent of the valuations of real estate, but no change was made in the valuation of any of the railroads applying for same save one. The appellant contended that the property tax as assessed was obnoxious to the Federal Constitution because it denied equal protection of the law in that the railroads were discriminated against, because relief was allowed to the owners of real property and denied the railroads, and the court said:

"The claim that plaintiffs have been denied equal protection of the laws appears to rest more largely on the charge that discrimination has been practiced against them in administering the tax laws. It is urged that county boards proceeding under Section 28a of the Act of 1921, reduced real estate valuations quite generally, but that the State board, acting under Section 28g, refused to reduce the valuation of any railroad except that of the Norfolk & Southern. The rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class, belonging to others. Raymond vs. Chicago Union Traction Co., 207 U. S., 20, 52 L. Ed., 78, 28 Sup. Ct. Rep., 7, 12 Ann. Cas., 757. This may be true, although the discrimination is practiced through the action of different officials. Greene vs. Louisville & I. R. Co., 244 U. S., 499, 61 L. Ed., 1280, 37 Sup. Ct. Rep., 673, Ann. Cas., 1917E, 88. But, unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause. Sunday Lake Iron Co. vs. Wakefield Twp., 247 U. S., 350, 353, 62 L. Ed., 1154, 1156, 38 Sup. Ct. Rep., 495; Chicago, B. & Q. R. Co. vs. Babcock, 204 U. S., 585, 51 L. Ed., 636, 27 Sup. Ct. Rep., 326; Coulter vs. Louisville & N. R. Co., 196 U. S., 599, 40 L. Ed., 615, 25 Sup. Ct. Rep., 342; Sioux City Bridge Co. vs. Dakota County, decided this

day (— U. S., —, post, —, 43 Sup. Ct. Rep., —). Plaintiffs have clearly failed to establish that there was intentional and systematic undervaluation by the county boards. Strong evidence to the contrary is furnished by the fact that in thirty-three counties, including those in which the largest cities are located, no reduction was made in the valuation of real estate, and that in the remaining sixty-seven counties the reduction varied from 1 to 50 per cent. Plaintiffs have failed, likewise, in showing systematic refusal on the part of the State board to allow a proper reduction in the valuation of any railroad. The further contention that, by reduction of the Norfolk & Southern's assessment, the other plaintiffs were discriminated against, is also unfounded.

"The claims that the assessments made by the Legislature in 1920 violate the due process and commerce clauses of the Federal Constitution and the true value and uniformity clauses of the State Constitution rest largely upon the contentions that the valuations were made on wrong principles and are excessive. There was ample opportunity to be heard; and the opportunity was availed of. There is no suggestion of bad faith. At the most there have been errors of judgment; and mere errors of judgment are not subject to review in these proceedings. Pittsburg, C. C. & St. Louis R. Co. vs. Backus, 154 U. S., 421, 38 L. Ed., 1031, 14 Sup. Ct. Rep., 1114; New York ex rel. Brooklyn City R. Co. vs. New York, 199 U. S., 48, 52, 50 L. Ed., 79, 85, 25 Sup. Ct. Rep., 713. There was no taxation of interstate commerce. Postal Teleg. Cable Co. vs. Adams, 155 U. S., 688, 39 L. Ed., 311, 5 Inters. Com. Rep., 1, 15 Sup. Ct. Rep., 268, 360; Western U. Teleg. Co. vs. Taggart, 163 U. S., 1, 41 L. Ed., 49, 16 Sup. Ct. Rep., 1054. * * *"

In the case here under consideration there is no contention on the part of the appellant that there was any intentional violations of the essential principles of practical uniformity in arriving at the value of the intangibles of the Railway Company, it being the contention of appellants that an essentially wrong formula was used and that it obtained a result which discriminated against the appellants, and while it is not admitted, but expressly denied, that there is any proof to show that any actual discrimination resulted against appellant by the action of the

Tax Board in finding their intangible values, there is certainly no evidence that the Board was actuated by any wrong motives or that there was any systematic intentional unequal assessments against them. The Supreme Court found that the Board was not guilty of any fraud in arriving at this value. (Record, p. 544.)

In the case of Sioux City Bridge Co. vs. Dakota Co., 67 L. Ed., 231, Chief Justice Taft in delivering the opinion of the court said, quoting from the case of Sunday Lake Iron Co. vs. Wakefield Twp., 247 U. S., 350:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional, systematic undervaluation by State officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. Raymond vs. Chicago Union Traction Co., 207 U. S., 20, 35, 37, 52 L. Ed., 78, 87, 88, 28 Sup. Ct. Rep., 7, 12 Ann. Cas., 757." Analogous cases are Greene vs. Louisville & Interurban R. Co., 244 U. S., 499, 516-518, 61 L. Ed., 1280, 1289, 1290, 37 Sup. Ct. Rep., 673, Ann. Cas., 1917E, 88; Cummings vs. Merchants Nat. Bank, 101 U. S., 153, 160, 25 L. Ed., 903, 905; Taylor vs. Louisville & N. R. Co., 31 C. C. A., 537, 60 U. S. App., 166, 88 Fed., 350, 364, 365, 372, 374; Louisville & N. R. Co. vs. Bosworth, 209 Fed., 380, 452; Washington Water Power Co. vs. Kootenai County, 270 Fed., 369, 374.
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> "The charge made by the bridge company in this case was that the State, through its duly constituted agents, towit, the county assessor and the county board of equalization, improperly executed the Constitution and taxing laws of the State, and intentionally and arbitrarily assessed the bridge company's property at 100 per cent of its true value, and all the other real estate and its improvements in the county at 55 per cent.
>
> "It is therefore just that, upon reversal, we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well established rule in the

decisions of this court, cited above, that mere errors of judgment do not support a claim of discrimination, but that there must be something more,—something which, in effect, amounts to an intentional violation of the essential principle of practical uniformity. Sunday Lake Iron Co. vs. Wakefield Twp., 247 P. S., 350, 353, 62 L. Ed., 1154, 1156, 38 Sup. Ct. Rep., 495."

The Board found the entire value of the Railway Company's property to be $39,116,033. They found the true physical value to be $28,372,810. At the hearing held by the Board after notice to the Railway Company, the Railway Company introduced evidence showing the actual value of the tangible property to be $32,471,027 and betterments made since such valuation making the total valuation $34,013,092.07. After the hearing the Board adhered to such preliminary values that the entire property was worth $39,116,033, and the physical property $28,372,810 leaving the value of the intangibles at $10,743,233. (Record, p. 543.) There is no evidence showing that tangibles were valued as intangibles or that there was any double taxation.

The testimony of Mr. Bagby, heretofore referred to, shows that the Board sought information in every possible way to find the real value of the entire property of the Railway Company and that the valuation as found represented the best judgment of the Board as to the true value of its entire properties upon all the information which he had before him and that the representatives of the Railway Company did not offer any facts to show any different value.

The Supreme Court in passing on this case found that the Board acted in good faith and that there was no evidence that they acted arbitrarily or that the valuations were brought about or affected by fraud, bad faith or other improper motives, but that said valuations reflected the best judgment of the Board. (Record, p. 544.) The Court of Civil Appeals found that the valuations as found by the Board were not affected by fraud.

There was no attempt on the part of the Board to value tangibles of the Railway Company as intangibles, but that they ascertained

in compliance with Article 7420, supra, the entire value of the property of the Railway Company within the State, and that they deducted therefrom the true value of all the tangible property of such railway company within the State.

We take it, this court is bound by the findings of fact made by the Supreme Court of Texas, the court of last resort in Texas. The Supreme Court found that there was warrant for the findings of the Board that the value of the tangibles of the Railway Company amounted to $28,372,810. (Record, p. 544.) That the intangibles of a railway company could be assessed only in the manner provided in the act, that is upon the certified valuations and apportionments of the State Board, that the physicals are taxed under the general law, that the act neither requires nor authorizes a double taxation of intangibles. It is insisted by plaintiffs in error that under Article 1590, Revised Statutes, the Supreme Court is without jurisdiction to pass on a question of fact, but it is our contention here that the Supreme Court was passing on a question of law, that is whether or not there was any evidence tending to show that the Board was actuated by any improper motives or that their actions were affected by fraud or whether there is any evidence showing or tending to show that the Board had undertaken to tax tangibles as intangibles. The Supreme Court of Texas undoubtedly had jurisdiction to pass on this matter as a question of law that is whether or not there was any such evidence.

There being nothing to show that the Board acted fraudulently or with wrongful intent or that the valuation was not the result of its deliberate judgment, upon sufficient consideration and abundant evidence and, it being shown that there is no double taxation and no attempt on the part of the Board and no act of the Board had valued tangibles as intangibles, due process of law was not lacking, there was no inequality before the law and its judgment should not be overthrown.

And therefore, defendants in error respectfully pray that the action of the Supreme Court of the State of Texas in reversing

and rendering this case be affirmed, and for such other relief as may be their due.

Respectfully submitted,

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